Supreme Court, U. S.
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No. A-335

In the Supreme Court of the United States

OCTOBER TERM, 1977

77-1085

AMERICAN BILTRITE, INC., TENNESSEE PUBLIC SERVICE COMMISSION, DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT OF THE STATE OF TENNESSEE, CITY OF CENTERVILLE, CITY OF HOHENWALD, AND HICKMAN AND LEWIS COUNTIES, TENNESSEE,

Petitioners,

V.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner, American Biltrite, Inc., by and on behalf of itself and all petitioners, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Order of the Court of Appeals of June 27, 1977, is not yet reported and is attached hereto as Appendix A. The Order of the Court of Appeals of July 25, 1977, is not yet reported and is attached hereto as Appendix B. The

Decision and Order of the Interstate Commerce Commission, dated November 29, 1976, Docket No. AB-2 (Sub-No. 5) is attached hereto as Appendix C. That Order affirmed the report and findings of the Administrative Law Judge dated May 27, 1976 and that decision is attached hereto as Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on June 27, 1977. A timely petition for rehearing was denied by order entered July 25, 1977. An order was entered on October 12, 1977, extending the time for the filing of this Petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission failed to recognize the statutory burden of proof requirement of the Interstate Commerce Act.
2. Whether the Interstate Commerce Commission properly considered the financial data provided by the Louisville and Nashville Railroad in determining "public convenience and necessity."

STATUTES INVOLVED

The Railroad Revitalization and Reform Act (the "4-R" Act), 45 USC 801, et seq., was enacted:

> to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States, and to promote the revitalization of such railway system, so that this mode of transportation will remain viable in the private sector of the economy and will be able to provide energy-efficient, ecologically compatible transportation services with greater efficiency, effectiveness, and economy, through--

> (1) ratemaking and regulatory reform;
>
> (2) the encouragement of efforts to restructure the system on a more economically justified basis, including planning authority in the Secretary of Transportation, an expedited procedure for determining whether merger and consolidation applications are in the public interest, and continuing reorganization authority;
>
> (3) financing mechanisms that will assure adequate rehabilitation and improvement of facilities and equipment, implementation of the final system plan, and implementation of the Northeast Corridor project;
>
> (4) transitional continuation of service on light-density rail lines that are necessary to continued employment and community well-being throughout the United States;
>
> (5) auditing, accounting, reporting, and other requirements to protect Federal funds and to assure repayment of loans and financial responsibility; and
>
> (6) necessary studies.
>
> (45 USC 801(a)).

Section 802 of the "4-R" Act was amended to provide in part:

> The burden of proof as to public convenience and necessity shall be upon the applicant for a certificate of abandonment or discontinuance.
>
> 49 USC 1a.

STATEMENT OF THE CASE

On November 29, 1976, the Interstate Commerce Commission issued its Decision and Order, Docket No. AB-2 (Sub-No. 5), entitled "Louisville and Nashville Railroad Company, Abandonment Between Colesburg and Hohenwald in Dickson, Hickman and Lewis Counties, Tennes-

see." This Order affirmed and adopted the report and findings of the decision of the Administrative Law Judge in that proceeding. In short, the decision allowed the abandonment of the rail line in question.

On October 1, 1973, the Louisville and Nashville Railroad Company (L&N) filed for a certificate of public convenience and necessity pursuant to Section 1 (18)-(20) of the Interstate Commerce Act, for permission to abandon that portion of its railroad that extends in a southwesterly direction from Mile Post 2 at Colesburg, Tennessee to approximately Mile Post 52 near Hohenwald, Tennessee. The line in question is approximately 50.5 miles long. Protests were filed to L & N's request by a variety of parties, including petitioner, American Biltrite, Inc., Brotherhood of Maintenance of Way Employees, the City of Hohenwald, Tennessee, the Department of Economic and Community Development of the State of Tennessee, Fibreboard Corporation, Hickman County, Tennessee, J. M. Huber Corporation, Lewis County, Tennessee, the Tennessee Public Service Commission and the United Transportation Union. A hearing was held before the Administrative Law Judge on January 14-16, 1976, in Nashville, Tennessee and on May 17, 1976, she ruled, *inter alia*, that the proposed abandonment should be permitted. The Interstate Commerce Commission affirmed, *supra*.

An appeal was initiated on December 16, 1976, by a petition for review of the Order of the Commission. The Commission's Order of abandonment was stayed pending the outcome of the appeal. After the orders of the Court of Appeals, the Commission certified the abandonment of the line on October 20, 1977.

The evidence adduced at the hearing as well as the position of the petitioners is adequately set out in the Opinion of the Administrative Law Judge. Those portions of the opinion relevant to the arguments of petitioners shall be discussed herein.

REASONS FOR GRANTING THE WRIT

This case involves vital issues regarding the abandonment of railway lines in the United States. Particularly, it involves the extent to which those lines shall be abandoned under the auspices of The Railroad Revitalization and Regulatory Reform Act (the "4-R" Act.).

I.

THE COURT OF APPEALS, IN AFFIRMING THE ACTION OF THE INTERSTATE COMMERCE COMMISSION, DID NOT OBSERVE THE STATUTORY PRESUMPTIONS AND INTENT OF THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT.

The Railroad Revitalization and Reform Act (the "4-R" Act), 45 USC 801, et seq., was enacted:

> to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States, and to promote the revitalization of such railway system, so that this mode of transportation will remain viable in the private sector of the economy and will be able to provide energy-efficient, ecologically compatible transportation service with greater efficiency, effectiveness, and economy . . . (45 USC 801(a)).

As part of the statutory scheme, Congress amended Section 1 of the Interstate Commerce Act (49 USC 1a) by providing a new section prescribing the method by which rail service may be discontinued and abandoned. The new requirements promulgated include filing and notice requirements, provision for hearings and the availability of continuance of service through subsidy or acquisition by affected parties. See Section 802 of the Act.

In recognition of the severity of discontinuance or abandonment of rail service, the Congress established a clear

burden of proof to be borne by the railroad seeking such extreme relief. The Section now provides:

> The burden of proof as to public convenience and necessity *shall be upon the applicant for* a certificate of abandonment or discontinuance.
>
> 49 USC 1a (emphasis added).

The legislative history of the "4-R" Act clearly demonstrates the intent of Congress to not only restore the stability of the railway system but also to maintain the economy of the nation by the continuance of rail service. The report of the Senate Commerce Committee of November 26, 1975 (Senate Report No. 94-499) declared:

> The importance of railroads to our Nation's economy cannot be overemphasized. Even after decades of expanding truck, air and barge operations and a deteriorating rail industry, railroads are still the leading carrier in terms of freight ton-miles. The more than 850 billion ton-miles moved in 1973 represent approximately the same volume as all other carriers combined, except pipelines.
>
> (Senate Report No. (4-499, p. 4).

By providing for the burden of proof to be placed upon the railroad, Congress implemented its intent to favor continuance of service. The railroad itself must justify depriving the economy of that important means of transportation. Thus, the commission is obliged to rule in favor of continuance unless there is clear proof to the contrary.

It is of dubiety whether the Commission in the instant case followed such standard. The opinion of the Administrative Law Judge, stated, "The Act states that abandonment shall occur unless and until the Commission issues a certificate that the present or future public convenience and necessity permit such abandonment. To make this judgment, it is necessary to weigh the arguments advanced pro and con." (see p. 28, infra). This is not the standard imposed by the Act, nor, it is submitted, is it the proper standard to be imposed. A mere "weighing" of the arguments does not cast the burden upon the railroad but contrarily, imposes an equal burden upon railroad and protestants.

It is manifestly clear what Congress intended by the use of the phrase "burden of proof." That such a mere weighing of the evidence was not intended is shown by the universal definition of the standard set by the Act.

> Usually the party who has the duty of pleading a fact has also the first burden of producing evidence of the fact. . . . Likewise the pleader will ordinarily be found at the close of the evidence to have this ultimate burden of persuasion.
>
> McCormick, *Evidence*, Section 307.

The Administrative Law Judge weighed the evidence, but she apparently did not so consider the evidence with the knowledge that the task of persuasion was upon the railroad and not upon all parties equally.

A reading of the Judge's opinion and the affirming Order of the Commission discloses *no* reference to the statutory burden of proof. Protestants were, therefore, forced to argue their positions without the statutory presumption Congress had granted. Review by this Court is necessary to resolve and determine the proper burden of proof that shall be imposed in rail abandonment cases.

II.

THE FINANCIAL DATA PROVIDED BY THE RAILROAD AND RELIED UPON BY THE ICC DID NOT SUPPORT THE ABANDONMENT ORDER.

Although the decision of the Administrative Law Judge correctly states that losses had occurred during the operation of the line (p. 28, infra), there is not adequate discussion or consideration of the clear probability that the railroad's application to abandon on October 1, 1973 would, in fact, enhance such losses. It is not reasonable that new industry or other potential users of the line would locate along the railroad after the announced decision to discon-

tinue service. The railroad thus perpetuated its argument in favor of abandonment.

It appears that the failure of profitable operation is, of itself, reason to allow abandonment. If this is the proper test, Commission action is unnecessary. A railway would merely display its loss statements and proceed to close its lines. Such an interpretation is in clear contravention of the Congressional intent to promote railway service that is "viable in the private section of the economy." 45 USC 801 (a). Unless this Court agrees to review the standards to be imposed upon railroads seeking to discontinue service, the intent of Congress will be frustrated. Review is necessary to insure that the determination of "public convenience and necessity" is not left to the discretion of the rail carriers alone.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

No. 76-2651

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL.

Petitioners

and

AMERICAN BILTRITE, INC.,

Intervening Petitioner ORDER

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

Respondents

and

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

Intervening Respondent

Before: WEICK *and* PECK, Circuit Judges, *and* FREEMAN*, Senior District Judge.

This matter is before the Court under a petition to review an order of the Interstate Commerce Commission which found that the present and future public convenience and necessity permit abandonment of service by the

*Honorable Ralph M. Freeman, United States District Court for the Eastern District of Michigan, sitting by designation.

intervenor Louisville and Nashville Railroad Company between Colesburg and Hohenwald in Dickson, Hickman and Lewis Counties, Tennessee, and has been submitted on the briefs and oral arguments of counsel for the petitioners, respondents and intervenors. In this regard, notation is made of the fact that Willamette Industries, Inc., filed a motion for leave to intervene on June 9, 1977, and a memorandum in opposition to said motion was filed by the Interstate Commerce Commission June 13, 1977; in view of the fact that the matter was set for hearing on the merits on June 16, 1977, and was heard on that date, said motion is denied as untimely. Being fully advised in the premises, the Court concludes that the Interstate Commerce Commission's decision to grant the abandonment application is rational and supported by substantial evidence. Therefore,

IT IS ORDERED that the order of the Interstate Commerce Commission here under review be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, *Clerk of Court*

APPENDIX B

No. 76-2651

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL.

Petitioners

and

AMERICAN BILTRITE, INC.,
Intervening Petitioner

v.

ORDER

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION
Respondents

and

LOUISVILLE AND NASHVILLE
RAILROAD COMPANY
Intervening Respondent

Before: WEICK and PECK, Circuit Judges, and FREEMAN*, Senior District Judge.

This matter having been submitted under the petitioners' petition for rehearing, and it having been concluded that said petition is not well taken,

IT IS ORDERED that the Petition for Rehearing be and it hereby is denied, with the observation that in entering its order of June 27, 1977, the Court was guided by the statutory presumptions and requirements of the Railroad Revitalization and Regulatory Reform Act, 45 U.S.C. §801, et seq.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN, *Clerk of Court*

APPENDIX C

DECISION AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D.C., on the 18th day of November, 1976.

Docket No. AB-2 (Sub.-No. 5)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY—
ABANDONMENT BETWEEN COLESBURG AND HOHENWALD
IN DICKSON, HICKMAN AND LEWIS
COUNTIES, TENNESSEE

Upon consideration of the application and the record in the above-entitled proceeding, including the initial decision and recommended order of the Administrative Law Judge, the exceptions filed jointly by American Biltrite, Inc., J. M. Huber Corporation and Fibreboard Corporation and jointly by Tennessee Public Service Commission, United Transportation Union, Department of Economic and Community Development, Hickman and Lewis Counties and the Cities of Hohenwald and Centerville, Tenn., and the reply thereto of the Louisville and Nashville Railroad Company; and

It appearing, That the Administrative Law Judge recommended that the application in the above-entitled proceeding be granted;

It further appearing, That the findings and conclusions of the Administrative Law Judge, with respect to all matters of fact and law disposed of in her report, are in all material respects proper and correct; that the pleadings present no new material matters of fact or law not adequately considered and properly disposed of by the Administrative Law Judge in her report, and are not of such a nature as to require the issuance of a report discussing the evidence in the light of the pleadings;

It further appearing, That this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National

Environmental Policy Act of 1969:

Wherefore, and good cause appearing therefor:

We find, That the evidence considered in the light of the pleadings does not warrant a result different from that reached by the Administrative Law Judge, and that the statement of facts, the conclusions, and the findings of the Administrative Law Judge, in her report, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

It is ordered, That subject to the same conditions for protection of employees as set forth in *Chicago B&Q R. Co. Abandonment*, 257 I.C.C. 700, the present and future public convenience and necessity permit abandonment by the Louisville & Nashville Railroad Company (L&N) of the line of railroad which turns out of the L&N's main line at Colesburg, Dickson County, Tenn., and extends from milepost 2 to just south of milepost 52 near Hohenwald, Lewis County, Tenn.; *provided*, *however*, that any responsible state agency and/or local government or other interest responsible organization be given the opportunity for a period of 90 days from the date of issuance of a certificate of public convenience and necessity permitting abandonment to negotiate the purchase of all or any portion of the right-of-way of the line to be abandoned for public use at a purchase price on such terms as the parties may agree as just and reasonable, and that L&N shall hold the involved property under the tracks intact for this period of time;

It is further ordered, That subject to the conditions set forth in the initial decision for the provision of financial assistance for continued operations or acquisition of the subject line, an appropriate certificate of abandonment shall be issued, and the applicant shall not effect any abandonment or discontinuance of service prior to the effective date of such certificate of abandonment;

It is further ordered, That this order be effective 35 days from the date of service hereof.

By the Commission, Division 3, Commissioners Brown, MacFarland and Clapp.

ROBERT L. OSWALD, *Secretary*

APPENDIX D
INTERSTATE COMMERCE COMMISSION

INITIAL DECISION

No. AB-2 (Sub-No. 5)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
ABANDONMENT BETWEEN COLESBURG AND HOHENWALD
IN DICKSON, HICKMAN AND LEWIS
COUNTIES, TENNESSEE

Public convenience and necessity shown to permit abandonment by Louisville and Nashville Railroad Co. of its Centerville Branch. Conditions prescribed. Issuance of a certificate withheld pending compliance with Public Law 94-210.

Fred R. Birkholz and *Wandaleen Poynter* for applicant.

E. Warner Bass, Douglas T. Bates, James N. Clay, H. J. Coffey, Joseph T. Hester, William Landis Turner and *Eugene W. Ward* for protestants.

By Brenda P. Murray, Administrative Law Judge:

This is an application by the Louisville and Nashville Railroad Co. (L&N or Railroad), filed October 1, 1973,[1] under section 1 (18)-(20) of the Interstate Commerce Act, for a certificate of public convenience and necessity permitting the abandonment of that portion of railroad which turns out of the L&N's Nashville to Bruceton main line at Colesburg, Dickson County, Tenn., and extends in a southwesterly direction from Mile Post (M.P.) 2 at Colesburg, through Hickman County to just south of M.P. 52 near Hohenwald, Lewis County, Tenn., a distance of approximately 50.5 miles (Centerville Branch).[2]

[1] The delay in processing resulted from court appeals in *Harlem Valley Transportation Ass'n* v. *Stafford*, 360 F. Supp. 1057 (S.D.N.Y. 1973) aff'd 500 F. 2d 328 (1974).

[2] The Railroad intends to leave the line in place to M.P. 5. It will be reclassified as an industrial spur and will serve the proposed Dickson Industrial Park. The application covers the total branch.

The Commission's staff issued an "environmental threshold assessment survey" which found that no significant impact on the environment would result from abandonment of the line.[3] This assessment was widely publicized and comments requested. Based on the staff assessment and the comments received, the Commission found in an order served September 15, 1975, that an "environmental impact statement" need not be issued because the proceeding did not present a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, U.S.C. #4321, et seq.

Notice of the proposed abandonment was posted and served as required under the act and the Commission's regulations. Protests were filed and the matter was referred to me for hearing and preparation of an initial decision. A hearing was held on January 14-16, 1976, at Nashville, Tenn., at which the application was opposed by American Biltrite, Inc., Brotherhood of Locomotive Engineers, Brotherhood of Maintenance of Way Employees, City of Hohenwald, Tenn., Department of Economic and Community Development of the State of Tennessee, Fibreboard Corporation, Hickman County, Tenn., J. M. Huber Corp., Lewis County, Tenn., Tennessee Public Service Commission and the United Transportation Union. The Brotherhood of Locomotive Engineers withdrew its opposition based on the railroad's acceptance of the Burlington conditions.

Most of the parties filed briefs which were due March 22, 1976.[4]

APPLICANT

The single track line of railroad proposed for abandonment is a 50.5 mile stub-end branch line which turns

[3] The survey noted that the Tennessee Department of Conservation wants to use the right-of-way for recreational purposes as part of the Natchez Trace Trail. If the abandonment is approved the L&N is agreeable to a condition which would keep the property under the track intact for 90 days pending an offer of purchase for recreational purposes.

[4] Applicant's brief arrived at the Commission on March 28, 1976. Its request to be allowed to file this brief late is granted.

BEST COPY AVAILABLE

out of the L&N's main line between Nashville and Bruceton, Tenn., at Colesburg, Dickson County and runs north-south about 40 miles west of Nashville. See Appendix A. The line is entirely within the state of Tennessee. It serves the following prepaid stations: Pomona, Tidwell, Lyles (pop. 500), Brown, Nunnelly (pop. 200), Elkins, Centerville (pop. 2,592), Deans, Watson, Buffalo, Theodore and Hohenwald (pop. 3,385).[5] The line consists of 80, 90 and 102 pound rail with approximately two miles of 62 and 68 pound rail located between M.P. 38 and 39 and M.P. 33 and 34, respectively The line has had a maximum speed limit of 10 m.p.h. since 1969. The weight restriction on the line is 220,000 pounds per gross car. The line has numerous grades that exceed 2 percent,[6] numerous curves that exceed 15 degrees,[7] 7 wooden trestles and 12 bridges. The L&N uses an F-7 locomotive on the line and the avrage train has 15 cars. It is not possible to add more power and run longer trains because of the curves and grades.

The line is served by a mobile agent out of Bruceton. In January, 1976, service was reduced from tri-weekly to once a week. A round trip on the Branch takes between 10 and 12 hours. When the service was tri-weekly, it was performed by a regular crew consisting of an engineer, a conductor and a brakeman who received two days pay.[8] It is now performed by an "extra crew". The engineer is based in Dickson but the other three people are out of Nashville and get deadhead time for the 80 mile trip it takes to get to and from Dickson.

The line has no local traffic and, of course, as a stub-end line it does not have any overhead traffic. In 1973, 1,308 carloads either originated or terminated on the line; in

[5] Population figures are from the 52nd edition of the Rand McNally Road Atlas.

[6] Exhibit 22 shows the location on the line by Mile Post designation of 150 spots where the grade exceeds 2 per cent. These total 16.54 miles.

[7] Tr. page 335-336, gives Mile Post designation for 14 curves that exceed 15 degrees.

[8] The Federal Hours of Service Law requires that a train crew can be on duty a maximum of 12 hours. In the opinion of the L&N's General Manager Transportation, it is hard to travel 101 miles at 10 m.p.h. and do the required switching in 12 hours so that crews usually get a day's pay for going out and one for coming back.

1974, 944 carloads and in 1975, 580 carloads.[9] Most of the traffic was either lumber or wood products or chemicals or allied products. A breakdown of traffic by commodity (Standard Transportation Commodity Code) is shown on Appendix B. This traffic yielded revenue to the rail industry of $376,300 in 1973; $433,500 in 1974 and $201,300 for the first nine months of 1975. Of these totals, the L&N received $258,700 in 1973; $270,000 in 1974 and $118,400 for the first nine months of 1975.

A railroad study of the line in 1965 showed that it was profitable by $50,000 or $60,000. Traffic declined considerably after July, 1966, when a shipper which generated 64 percent of the line's traffic, Tennessee Products and Chemical Corp., at Lyles went out of business.

The L&N figures the total avoidable on branch costs to be $157,789 for 1974. This figure includes actual expenses spent on the maintenance of way and structures ($22,933) and a per mile allocation to ascertain a figure for the maintenance of equipment ($27,157) and transportation ($69,226).[10] Using this total avoidable cost figure ($157,789) and assigning revenue to the line on the basis of car miles traveled over the Branch as compared with car miles over the rest of the L&N system ($31,696), the line lost $126,093 in 1974. Taking the total revenue earned to the L&N from traffic originating or terminating on the line ($270,064) and total avoidable expenses (on Branch of $157,789 and off Branch of $119,184, using the I.C.C.'s 50 percent rule to estimate off line expenses),[11] the line lost $6,909 the same year. The Railroad sees this figure as the benefit to it if the line had been abandoned in 1974. Using figures for January-September 1975, the line lost $44,949. The railroad's avoidable expenses and effect on operating income are shown on Appendix C and D.

[9] Tr. page 31-32, these figures covered cars where the interline settlements were received in the time period given. There is no reason to believe that actual car moves would differ significantly.

[10] Transportation includes ICC Accounts Nos. 373—Stations Employees and 376—Station Supplies. These are actual expense figures.

[11] The L&N contends that off Branch expenses would be higher using costs for the southern region in the I.C.C.'s Bureau of Accounts, "Rail Carload Cost Scales by Territories for the year 1973", Statement No. 101-73, Washington, D. C., August, 1975.

All of these calculations are based on the expense of tri-weekly service. Based on service once a week and using the traffic for 1974, the railroad would have broken even in that year and in 1975, based on 1975 traffic, would have lost $41,000.

The L&N admits that the line is now in poor condition. It has not performed a great deal of rehabilitation, hoping for a favorable determination of this application. It is able to maintain the line at minimum standards (10 m.p.h.) by performing spot maintenance; however, a general rehabiliation would involve replacing the light rail (9,244 linear feet), general retimbering, full stabilization and ditching to assure proper drainage. The result would put the line substantially above FRA Class I standards, but the physical conditions would prevent speeds over 25 or 30 m.p.h. The estimated cost of this rehabiliation and maintenance would be $602,100 expended over five years.

The railroad does not consider the area served by the Branch to be attractive for industrial development by companies who will use the railroad. It has not attempted to attract industry to this location since 1973 but even before then it did not enjoy much success in convincing companies to locate in this area. Since 1966 only one rail user has located on the line.

The L&N's balance sheet dated September 30, 1975, shows total assets and liabilities, including shareholders' equity, of $1.3 billion. Its income account shows net income transferred to retained income-unappropriated of $25.5 million in 1973, $37 million in 1974 and $16.9 million for the first nine months of 1975.

Between 1965 and 1974 the railroad's operating revenues have gone up 221 percent, from $274,613,000 to $607,-231,000, while its operating expenses increased 225 percent, 4 percent more, from $236,901,000 to $533,151,000.

The L&N is agreeable to the imposition of the Burlington conditions for the protection of employees on the Centerville Branch.

PROTESTANTS

The Department of Economic and Community Development of the State of Tennessee was created by Chapter 852 of the 1972 Tennessee Public Acts. The statute empowers The Department's Industrial Development Division to act with and/or on behalf of communities and business and industries throughout the state to assure their continuous economic and industrial growth. The department is concerned because of the adverse effect it believes abandonment would have on the future of Hickman and Lewis Counties. It fears that a loss of rail service would result in a shutdown by MMF Wood Products, a division of Fibreboard Corporation, located in Centerville and Lewis Products (American Biltrite Corporation) in Hohenwald. A shutdown by these two companies could cause unemployment for some 600 workers or about 7 percent of the counties' total employment. In November 1975 the unemployment rate for this two county area was 8.9 percent or 1½ percent higher than the Tennessee average. Also, although no direct relationship can be shown at this time between other industries in the area and the rail line, the Department fears this abandonment would diminish economic and industrial growth potential in an already economically underdeveloped area. For these reasons it opposes the abandonment.

Lewis Products Company is the name used by the plant at Hohenwald entirely owned by American Biltrite Corporation. The plant manufactures fire hose, hydraulic hose and steam hose. It was acquired by American Biltrite in 1961 and at that time occupied 165,000 square feet and employed 314 people. It has increased considerably and at the present time covers 307,900 square feet, employs about 541 people and had a payroll in 1975 of $4.6 million as compared with $2,120,000 in 1966.

American Biltrite receives carbon black, synthetic rubber, limestone, clay, asphalt, Hi Sil and Silene D by rail. All of these shipments move over the Centerville Branch. American Biltrite moved carbon black from its supplier

in Borger, Tex., to Hohenwald by motor carrier prior to 1972. In December, 1972, 10 months before this application was filed, American Biltrite requested information from the railroad on the status of the Centerville Branch. It was informed by the L&N that it did study individual branch lines periodically and had studied the Centerville Branch and concluded that no attempt would be made to abandon it at that time. Based on this information, American Biltrite installed a bulk unloading facility and a new railroad spur at a cost to it of $268,211. American Biltrite's annual rail traffic increased from 7.2 million pounds in 1972 to 11.9 million pounds through December 12, 1975. It projects that it will receive some 13.2 million pounds in 1976 and 14 million pounds in 1977. It does not ship outbound by rail.

If the line is abandoned, American Biltrite expects that it will incur an additional annual transportation cost of $186,093 to receive its raw materials by truck. A breakdown by commodity would be as follows:

COST DIFFERENTIAL*

Product	*Weight in lbs.*	*Rail Cost*	*Truck Cost*
Clay	1,800,000	$ 13 914	$ 22,140
Asphalt	200,000	1,280	2,600
Hi Sil	400,000	4,000	11,400
Silene D	400,000	4,000	9,040
Synthetic Rubber			
Baton Rouge	1,200,000	7,320	20,160
Baytown	1,200,000	10,400	23,400
Borger	1,200,000	9,120	25,200
Carbon Black	5,500,000	63,800	179,850
Limestone	2,100,000	7,423	13,440

There are not any motor carriers authorized to transport carbon black from the Borger, Texas origin. The figure is based on information supplied by Robertson Transportation Line at Houston, Texas.

American Biltrite is especially loath to change suppliers of carbon black. It has used the same supplier at Borger,

Tex., J. M. Huber Corp., for over 20 years and would like to continue inasmuch as this supplier controls natural gas sources which are basic to the production of carbon black and has always been able to supply material even in times of shortage. Also, the use of a new supplier would force American Biltrite to reformulate its production since each supplier has different characteristics in the chemical ananlysis of its product. Carbon black is an essential ingredient being used in 80 percent of 230 compounds and it must be handled very carefully because of the possibility of contamination and pollution. American Biltrite does not believe it could go back to receiving carbon black by bag because of regulations promulgated since 1972 by the Occupational Safety and Health Administration and Environmental Protection Agency.

If the line is abandoned, this would be the only plant of American Biltrite not to have rail service. Because of the amount of raw material it uses, rail service was one of the prime considerations for locating the plant at Hohenwald. The company believes the cost of trucking plus the cost of formulation changes would make the Hohenwald plant non-competitive and it believes the plant will close if the line is abandoned.[12] It is able to live with once a week service.

J. M. Huber Corporation is the major supplier of carbon black and clay to American Biltrite at Hohenwald. Carbon Black originates at Huber's Borger, Texas facility and clay from its plant at Langley, S. C. Almost all of this material moves by rail. In 1975 Huber shipped more than 6,000,000 pounds of carbon back and 1½ million pounds of clay to Hohenwald. Carbon black is highly contaminating and very difficult to handle so that Huber ships a great deal of carbon black in specially designed rail hopper cars that it owns or leases. Customers prefer to receive bulk shipments because it is cheaper and easier to handle. The technical staff of J. M. Huber does not believe that it will be able to ship carbon black in bulk to the nearest

[12] The transcript is erroneous at page 149. See correction on page 9 of the Brief of American Biltrite Corp.

railhead and then move it by truck to Hohenwald because the pellets, the form in which the carbon black is shipped, will break down and the material will become very difficult to handle. Huber has checked on truck rates from Borger, Tex., to Hohenwald, a distance of 963 miles and was told by a bulk carrier that the rate would be approximately $3.27 per hundred pounds based on a minimum of 45,000 pounds. The present rail rate is $1.16 per hundred pounds. Using truck rather than rail, the increased cost per ton to the receiver would be $42.20. The reason for the high rate is that equipment used to transport carbon black usually cannot be used for anything else so that in most cases it is a one way haul. Huber does not believe that it would absorb much of this increase where the product sells for $18 a ton. It fears losing this business which amounts to about $500,000 a year and the idling of its privately owned specialized rail cars which now earn some $66,000 a year in mileage allowances on this traffic.

Fibreboard Corporation with principal offices in San Francisco, Calif., is a manufacturer of paperboard, packaging and forest products. The company's Forest Products Group operates a plant consisting of a sawmill and chipper at Centerville that was formerly operated by MMF Wood Products Company.[13] Fibreboard also operates hardwood sawmills at Pulaski and Fayetteville, Tenn. Fibreboard acquired the mill at Centerville for $1,000,000 in December, 1973. It was aware of the abandonment application when it made the purchase. Most of the lumber produced at Centerville is used as pallet stock. The sawmill can process approximately 10 million board feet of lumber per year and the chipper has a capacity of from 40 to 50,000 tons per year. Chips are being sold to Wescor at Hawesville, Ky., 195 miles away, and Celotex Corporation at Paris, Tenn., 107 miles away, and are being moved to these customers over the Centerville Branch. If it used trucks, Fibreboard expects that the additional cost would be $3.45 per ton to Hawesville[14] and $1.89 per ton to

[13] The mill is at times said to be at Centerville (M.P. 32) at other times at Watson (M.P. 38). The traffic originates at Watson.

[14] These figures are from Fibreboard's brief, the transcript at page 203 shows an estimated increase of $5.42 per ton by truck over rail from Centerville to Hawsville.

Paris, and an estimated $120,000 for storage bins to hold the chips until trucks are ready for loading.

The cost of a loading facility at Colesburg, a point in the L&N's main line, plus trucks to move the chips there would be $300,000 not counting the expense of operating trucks the 75 miles round trip. It expects that if it became necessary to go to trucking to move its wood chips that it would have to go to private carriage or obtain the services of a contract carrier.

When Fibreboard acquired this plant, it had plans for expansion; however, because of the down turn in the economy it has not been possible to do so. The mill had 10 employees in January, 1976; if operating at capacity it would employ from 50 to 60 people. The sawmill only operated one month in 1975 and the last half of 1974. In this same time frame, the chipper was closed down for three months and only operated one shift the rest of the time. In 1970 MMF Wood Products shipped 968 cars, in 1971 514 cars, in 1972 386 cars and in 1973 885 cars. Fibreboard shipped 506 cars in 1974 and 377 cars in 1975.

Fibreboard contends that it has had consistent problems in acquiring adequate rail cars to satisfy its shipping needs.[15] It cites September, 1975, when it had material available for loading 107 cars and was only furnished 50 cars. In the third quarter of 1975 it had production available to ship 215 cars but was only furnished 157. In December, 1975, it ordered 33 cars and received 23 cars and in the months of January up through January 12, 1976, it had 22 cars on order and was furnished only 10.

Neither the Pulaski nor the Fayetteville mills have rail service immediately available. At Pulaski Fibreboard operates a dump truck to take wood chips to a railhead about 3 miles away where they are dumped into a chopper that feeds the rail car. Chips from Fayetteville are shipped by truck 96 miles to Stefson, Ala. Fibreboard uses three chip trailers that it owns for this move. In 1975 about 15,000

[15] Exhibit No. 21 compares cars pulled, placed and on hand at Watson in 1975. The L&N offered this to show that Fibreboard's claim that it did receive sufficient cars was false.

tons of chips moved from both of these plants. Considering the present market and prices for wood chips in the Tennessee area, Fibreboard expects that elimination of railroad service will result in its closing its facility at Centerville.

Celotex Corporation makes cardboard siding for the housing industry at its Paris, Tenn., mill. Celotex buys wood chips from Fibreboard at Centerville. It pays Fibreboard $14 a ton delivered Paris. It would only agree to pay more to receive chips in unusual circumstances. Outside of Fibreboard its furthest supply of wood chips is 65 miles away. These chips are trucked in. It sees an improvement in the market for wood chips by the summer of 1976 from the poor market that has existed for the last year or two. Prior to the recession it had 11 suppliers and received about 100 tons a week. It now uses seven suppliers and receives about 40 tons a week. It is aware of possible changes in wood consumption worldwide that could improve radically the area's marketing possibilties for wood chips.

Westcorp-Western Craft jointly own a plant at Hawesville, Ky., that produces paper for the manufacture of cardboard boxes. Over the past five years, Westcorp-Western Craft has purchased the following amounts of wood chips from Fibreboard at Centerville:

1970—	5,215	tons or	968	carloads
1971—	30,246	" "	514	"
1972—	18,254	" "	339	"
1973—	36,370	" "	742	"
1974—	16,602	" "	307	"
1975—	11,480	" "	219	"

It pays $11 a ton loaded on a rail car plus freight charges on approximately $4.47 a ton. About 35 of the company's suppliers ship by rail, most of the others, 75 or so, use their own trucks to make delivery. If rail rates increase, it would look for another source of supply to replace the volume it is buying from Fibreboard. It sees an increasing demand for wood chips from the Hickman and Lewis County area. Western Craft has an active land acquisition program in the area and owns approximately 60,000 acres of

timber land. Other companies such as Koppers are doing likewise.

The local chairman for the United Transportation Union testified that his organization had met with local representatives of the L&N in an attempt to modify the existing labor agreement governing employees on the Centerville Branch. The negotiations which took place in July to September, 1975, did not get anywhere because the L&N did not see benefit to it from the proposal. The union's position is that appropriate protective conditions should be included in any order issued by the Commission authorizing the abandonment.

Mr. T. C. Carroll, County Judge, for Lewis County, Tenn., presented a resolution passed by the Quarterly County Court of Lewis County on January 12, 1976, protesting the abandonment of the Centerville Branch.

Mr. Dol Willis, Mayor of Hohenwald, Tenn., believes the loss of rail service will make it practically impossible for Hohenwald and the surrounding area to attract heavy industry. The Mayor fears that a shut down by Lewis Products (American Biltrite Corp.) would idle 20 percent of the area's work force. This city has received Federal funds for improvement of the sewer system in Hohenwald and has also applied for a $250,000 grant to be used to improve the industrial park of about 56 acres located on the railroad, just south of Lewis Products. Mayor Willis is aware of several companies which produce cross ties. They include Koppers and Moss American. Hohenwald also has a stave mill that makes barrels and these staves are shipped on the railroad.

Mr. Hunt McClanahan, County Judge of Hickman County, testified that the county has an industrial park about a quarter of a mile from the railroad line. The judge is of the opinion that the large timber and phosphate resources in the county are a valuable source of future rail traffic. He believes that abandonment of the rail line would stop heavy industry from moving into the county. He disagrees with the railroad witness who testified that the land along

the branch is too hilly for industrial development. The city also has an industrial park for which it received a Federal grant in 1969 for utilities. This park is 200 yards from the ralroad. It has one industry located in it now but this industry does not use the railroad. Both the county and the city industrial park are 60 acres each in size. The judge named several industries which have located in the county in the last several years. Some of these are Tennessee Gas and Transportation Company at Nunnelly, MMF Land Company, Rivers Manufacturing Company and McCaleb Lumber Company. They are located on the branch and he says they use the railroad.

ARGUMENTS IN BRIEFS

Applicant contends that operation of the Centerville Branch will result in a continuing and undue burden on it and on interstate commerce, which burden is not outweighed by the present or future public convenience and necessity. It refers to the 12 cars per mile use of the Branch in 1975 and the regulations at 49 C.F.R. #1121.20-1121.24 to establish the presumption that the public convenience and necessity do not require the line's operation. It contends that protestants have failed to rebut the presumption. The evidence of future rail traffic is speculative. It questions the weight to be given the statement of American Biltrite that it will close operations if the line is abandoned and thinks the record shows that Fibreboard's mill at Watson might die a natural death regardless of the line's continuation. It defends the poor condition of the line citing *Missouri-Kansas-Texas R. Co. Abandonment, Oklahoma*, 338 I.C.C. 720 (1971) and points to two cases for the proposition that the Commission has allowed the abandonment of even marginally profitable lines upon a showing that extensive rehabilitation costs would not be recouped by the carrier within the foreseeable future. Finally, it defends the level of service over the line as that required by traffic demands.

In a joint brief the United Transportation Union, the Tnnessee Public Service Commission, the Department of

Economic and Community Development of the State of Tennessee, the community of Hohenwald and Lewis County and the community of Centerville and Hickman County, contend that applicant was presumptuous in treating the line with only spot maintenance while the application was pending. They move to hold the proceeding in abeyance pending action or inaction by the State of Tennessee in connection with the Railroad Revitalization and Regulatory Reform Act of 1976, PL 94-210.

American Biltrite Corporation and J. M. Huber Corporation contend that the losses sustained on the Centerville Branch of $20,045 in 1973 and $7,202 in 1974[16] are negligible when compared with the amount of railroad profits in those years. They think that railroad expenses could be reduced by once a week operations and negotiations with the unions. They see the $600,000 rehabilitation expense as window dressing since a witness admitted that if the application was denied the railroad would not do this level of maintenance. It sees the disadvantages to protestants as far outweighing the slight loss to applicant.

Fibreboard Corporation states that its operation is totally dependent on rail service over the Centerville Branch as there is no present alternative and the mill will close if the application is granted. It claims that the railroad has set the stage for this application by deliberate neglect of the line and that current revenue should not be compared with the cost of restoring the results of the railroad's past inactivity. It alleges that prolonged neglect and economic conditions have had a stunning effect on traffic and that another factor has been the L&N's failure to fill its car orders. It stresses the adverse impact abandonment would have on the entire area.

PRELIMINARY MATTERS

In its Supplemental Brief protestants Tennessee Public Service Commission, et al, moved to hold this proceeding in abeyance. This motion is denied. This application has

[16] This figure is $6,909 if you carry through the corrections made at Tr. page 328.

already been pending over two years and the indefinite delay proposed would be unconscionable. The terms of the Railroad Revitalization and Regulatory Reform Act of 1976 are clear and if the continuation of operations is as vital to the State of Tennessee as claimed on this record, there will be opportunity for the state to act to continue rail service.

DISCUSSION AND CONCLUSIONS

The Act states that no abandonment shall occur unless and until the Commission issues a certificate that the present or future public convenience and necessity permit such abandonment. To make this judgment it is necessary to weigh the arguments advanced pro and con.

The railroad's position is that the line loses money and there is no reasonable prospect that this will change. The railroad's $602,100 five year rehabilitation figure is of little weight since rail personnel admitted that they had no intention of spending that amount.[17] What is extremely relevant is that the line lost $20,045 in 1973, $6,909 in 1974 and $44,949 for the first nine months of 1975, based on the railroad's avoidable expense of $280,101 in 1973, $276,973 in 1974 and $163,492 for the first nine months of 1975. Protestants were not able to refute the railroad's position that these figures were compiled using accepted railroad accounting procedures and reflect the avoidable expenses of running this line.

We believe these figures are accurate. Grades of more than 2 percent and curves that exceed 15 degrees are sufficient to hinder rail operations. It only stands to reason then that a 50.5 mile line that has 16.54 miles of grades exceeding 2 percent, 14 curves of 15 degrees or more, 7 wooden trestles and 12 bridges will be expensive to maintain and service. Conditions on this line are such that the average length of a train is 15 cars yet longer trains would require more power and it is not possible to add another locomotive because of the grades and curves.

It is not clear on this record whether service modifications would cut the line's losses. Witness Willinger said his cost calculations for 1973-1975 were based on tri-weekly service and that if service has been rendered once a week, the line would have broken even in 1974 and lost $41,000 for the first nine months of 1975.[18] However, L&N's Assistant Superintendent of the Nashville Division said the line had once a week service during August through September 7, 1975,[19] and at times it sounded as if he thought that it was cheaper to run tri-weekly service.[20] Protestants contend that it would of course be cheaper but give no specifics. Even if it would be cheaper, Fibreboard says it would not be satisfied with service once a week if the market for wood chips improves at all. To be profitable the line needs more traffic. More traffic would necessitate more than once a week service because of the limited number of cars that can be moved on each train. Altering service does not then seem to be any solution.

Protestants contend that the line's losses are negligible compared with the railroad's overall profit. This argument is short sighted and self-serving and the Commission has rejected it consistently. *Southern Pacific Abandonment*, 72 I.C.C. 404, 407 (1922), *Chesapeake & Ohio Railway Co. Abandonment*, 242 I.C.C. 622, 627-628 (1940) and *New York Central R.R. Co. Abandonment*, 254 I.C.C. 745, 761 (1944).

The only two shippers to testify in opposition are American Biltrite and Fibreboard. Fibreboard's traffic dropped in 1974 and 1975. It says it could not get the number of cars it needed, the railroad denies it, but Fibreboard does not say it would have had more rail traffic if it got more cars. In other words its car usage accurately reflects all its rail traffic. Fibreboard admits its rail usage is low and relies on projections of business upturns. This evidence of future need for wood chips is an unsubstantiated, hopeful prognostication and will not be accorded much

[17] Tr. page 90.

[18] Tr. pages 52 and 329.

[19] Compare Tr. page 301 and 303, at first witness said he cut service to once a week for economic reasons, then he says it might be cheaper to run the train three times a wek.

[20] Tr. page 303.

weight. The commission held in *Fort Dodge, Des Moines & Southern Railway Co. Abandonment*, 312 I.C.C. 708, 711 (1961) that:

> Although allegations of future increases in traffic are made, they appear largely speculative and no estimate as to the amount of such traffic, the revenue which might be derived therefrom, or the anticipated time when it will materialize, is made.

Moreover Fibreboard's claim that it cannot economically truck wood chips is softened by the admission that it does not have rail service adjoining its two other Tennessee hardwood mills and trucks wood chips 96 miles to a customer or 3 miles to the nearest rail head. If this line is abandoned, the nearest rail point would be about 38 miles away.

Rail transportation of bulk commodities such as Fibreboard's wood chips and the carbon black, clay and chemicals of American Biltrite is undeniably cheaper for the person paying the freight charges. This economy is not however, a reason to force the railroad to continue a service on which it loses money. The judge is aware of the hardships that could very well occur, especially to American Biltrite and its 500 or so employees. Recent Federal legislation is designed to deal with these situations.

The Railroad Revitalization and Regulatory Reform Act, PL 94-210, enacted February 5, 1976, amends section 1 of the Interstate Commerce Act and also provides Federal assistance to states which decide to participate in rail freight assistance programs. Now when the Commission determines that the public convenience and necessity permit abandonment of line of railroad it must publish this finding in the Federal Register. If within 30 days of publication, it finds that afinancially responsible person (including a government entity) has offered financial assistance which will likely cover (A) the difference between the revenues attributable to the line and the avoidable cost of providing rail freight service, together with a reasonable return on the value of the line; or (B) the acquisition cost of all or a portion of the line, it must post-

pone the issuance of a certicate allowing abandonment for a maximum of 6 months to allow the parties time to reach an agreement and thus for the life of the agreement.

Inasmuch as the new statute is highly technical, affected parties might want to contact the Commission's Rail Services Planning Office, 1900 L Street, N.W., Washington, D. C. 20036 (Telephone 202-254-3281) for assistance. That office is charged with aiding states to decide whether to subsidize and for defining the terms that are used in the cost standards. Further details of procedures under the new law are in the Commission's Notice serve March 31, 1976, a copy of which is attached. Questions as to the procedures should be directed to the Commission's Section of Finance, Interstate Commerce Commission, 12th Street and Constiution Ave., N.W., Washington, D.C. 20423 (Telephone 202-275-7245).

As noted in footnote 2, the Tennessee Department of Conservation has indicated an interest in acquiring the right-of-way for recreational purposes. The L&N is agreeable to a condition which would give the Department 90 days after the railroad receives a certificate allowing abandonment to make an offer of purchase. (The Department might be interested in section 809 of the new law.) Such a condition will be included in my findings. There being no evidence as to the environment, I will accept the determinations made in the Commission's order served September 15, 1975.

One last argument to be treated is the blow abandonment will have on the area's industrial development. The evidence shows that only one company that uses the railroad has located on the line in 10 years. The other firms named by community spokesmen apparently move their traffic by other modes because they d(d not appear in opposition. This record is not convincing that the area's industrial growth will be damaged by the abandonment.

The railway labor unions have requested that if this line is authorized to be abandoned, the so-called *Burlington* conditions, as prescribed in *Chicago, B & Q R. Co. Aban-*

donment, 257 I.C.C. 700, be imposed for the benefit of employees who may be adversely affected by the abandonment. The *Burlington* conditions are customarily imposed in abandonment proceedings and they are appropriate for this situation.

FINDINGS AND ORDER

Upon consideration of all the evidence of record, the Administrative Law Judge finds that the present and future public convenience and necessity permit the abandonment by the Louisville and Nashville Railroad Company of the line of railroad which turns out of the L&N's main line at Colesburg, Dickson County, Tenn., and extends from Mile Post 2 to just south of Mile Post 52 near Hohenwald, Lewis County, Tenn., a distance of about 50.5 miles. Provided: That the L&N make available to employees the protective conditions set forth in *Chicago B & Q R. Co. Abandonment*, 257 I.C.C. 700 and that it hold the involved property under the tracks intact for 90 days following issuance to it of a certificate of public convenience and necessity permitting abandonment to allow for an offer of purchase by the Tennessee State Department of Conservation.

The Administrative Law Judge further finds that this is not a major Federal action significantly affecting the quality of the huuman environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. 4332, et seq.

It is ordered, That any person or government entity considering an offer of financial assistance to enable the rail service involved to be continued, should give notice promptly that it is considering such an offer by certified mail to the L&N and by first class mail to all parties of record and the Commission;

It is further ordered, That the L&N shall, within 10 days after receiving such a notice, make available to the party considering the offer of financial assistance the information described under the heading "Railroads Seeking Abandonment Authority," in the attached Notice of

the Commission entitled "Procedures for Pending Abandonment Cases," (Procedures) served and published in the Federal Register, 41 FR 13691, March 31, 1976, in the manner described in the Procedures;

It is further ordered, That upon this order becoming administratively final, notice of the finding of public convenience and necessity made herein shall be published in the Federal Register pursuant to the requirement of section 1a(6)(a) of the Interstate Commerce Act, as amended;

It is further ordered, That, notwithstanding any notice that financial assistance is being considered that may have been given pursuant to the above ordering paragraph, any person or government entity desiring to offer financial assistance to enable the rail service involved to be continued shall, within 15 days of publication in the Federal Register of the above-described finding of public convenience and necessity, send notification of such offer by certified mail to the L&N and the Commission and by first class mail to all parties of record, and such notification shall include the terms and information described under the heading, "Persons Offering Rail Service Assistance," which appears in the Procedures;

It is further ordered, That if the Commission finds that a financially responsible person has offered financial assistance in accord with the Procedures, the Commission shall postpone the issuance of a certificate of abandonment for such reasonable time, not to exceed 6 months, as is necessary to enable such person or government entity to enter into a binding agreement with the L&N to provide financial assistance for continued rail service or to purchase the rail line;

It is further ordered, That when the Commission is informed of the execution of any financial assistance agreement or acquisition and operating agreement, the issuance of the certificate of abandonment shall be postponed for such period of time as such an agreement (including any extensions or modifications) is in effect;

It is further ordered, That all correspondence to the Commission with respect to offers of financial assistance for the continued operations or acquisition of the subject line shall contain an appropriate reference to the subject proceeding; and that on the lower left-hand corner of envelopes containing such correspondence the following notation shall be typed in boldface "AB-RSCP";

It is further ordered, That subject to the conditions set forth above, an appropriate certificate of abandonment shall be issued, and the L&N shall not effect any abandonment or discontinuance of service prior to the effective date of such certificate of abandonment.

And it is further ordered, That this order shall be effective 20 days from the date of service in the absence of the filing of exceptions (appeal) or of a stay by the Commission.

Dated at Washington, D. C., this 17th day of May, 1976.

By the Commission, Brenda P. Murray,

By the Commission,

BRENDA P. MURRAY,
Administrative Law Judge

ROBERT L. OSWALD,
Secretary

(SEAL)

INTERSTATE COMMERCE COMMISSION

Washington, D.C.

NOTICE

PROCEDURES FOR PENDING RAIL ABANDONMENT CASES

Information to interested persons concerning the implementation of section 1a(8) of the Interstate Commerce Act, as amended by the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210,

enacted on February 5, 1976, which relates to abandonment or discontinuance of operations proceedings filed prior to the promulgation of new regulations pertaining to such proceedings.

General

The purpose of this Notice is to provide information about the Interstate Commerce Commission's proposed means for handling pending railroad abandonment and discontinuance proceedings and the procedures it will follow in processing abandonment applications already on file or filed before final regulations are effective. "Abandonment" means the elimination of a rail line and includes a discontinuance of operations. "Discontinuance" means only the cessation of operations over the line. The term "abandonment" is used in this notice to embrace both situations.

Changes in the Commission's abandonment procedures were made necessary by the enactment, on February 5, 1976, of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210). The need to process some 200 pending rail abandonment applications makes it imperative that these procedures be instituted as soon as possible, and precludes the opportunity for public comment at this time.

The procedures described in this Notice are of an interim nature and will apply, effective upon the date of their publication, to all cases in which the Commission authorizes the abandonment of a line of railroad pursuant to an application currently on file with it or filed before final regulations are effective. The Commission will soon issue a notice of proposed rulemaking looking toward the issuance of permanent regulations to govern subsequently filed abandonment applications. The procedures set forth in this Notice may be modified in view of the results of the proceeding.

New Abandonment Provisions

The procedures described in this Notice implement new paragraphs 1a(6) and (7) of the Interstate Commerce

Act. Those paragraphs contain new provisions under which—

1. The Commission must provide public notice, through Federal Register publication, of each instance in which it finds that the public convenience and necessity would permit a railroad to abandon trackage or discontinue service.

2. Persons, including governmental entities, wishing to preserve rail freight service set for discontinuance or abandonment may offer to purchase the line for continued operation or provide financial assistance to the railroad in the form of a "rail service continuation payment" (which may be conveniently termed an operating subsidy). In the words of new paragraph 1a(6) of the Interstate Commerce Act, the financial assistance must "(A) cover the difference between the revenues which are attributable to such line of railroad and the avoidable cost of providing rail freight service on such line, together with a reasonable return on the value of such line; or (B) cover the acquisition cost of all or any portion of such line or railroad."

3. If, within 30 days after publishing its finding that a proposed abandonment should be authorized, the Commission finds that a "financially responsible" person has made an offer likely to cover the losses on the line plus a reasonable profit, or to cover the cost of acquisition of all or any portion of such line, it must postpone the issuance of the certificate of abandonment (thus, in effect, requiring that service continue) for a period up to 6 months while negotiations for financial support take place. By the end of that 6 month period a binding agreement must be executed by the railroad and the offeror or a certificate authorizing the abandonment will be issued.

4. The applicant railroad is required to make available promptly to any person considering an offer of financial assistance its latest information about the physical condition of the line and data sufficient to permit computation of the amount of subsidy needed to justify continued operation.

5. Whenever an offer of financial assistance is made, the

Commission must determine the amount by which the avoidable costs attributable to the line, plus a reasonable return on the value of the rail properties involved, exceed the revenues attributable to the line, thus providing assistance to any offeror of a subsidy in determining the amount that would have to be paid. The Standards for Determining Rail Service Continuation subsidies, 49 C.F.R. §1125, adopted by the Commission's Rail Services Planning Office for the development of estimated subsidy payments under the Regional Rail Reorganization Act of 1973, shall be used in developing estimated payments under these new provisions.

6. The Commission must postpone the issuance of the certificate of abandonment for the period that any assistance or acquisition and operating agreement remains in effect.

The Local Rail Service Assistance Program

The new abandonment provisions of the Interstate Commerce Act are related to other provisions of Public Law 94-210. Section 803 of that act establishes a nationwide local rail services assistance program, to be administered by the United States Department of Transportation, under which the Federal government may reimburse the States for all or a portion of the funds expended by them in preserving or improving local rail freight service. The program becomes effective July 1, 1976, and extends through June 30, 1981. To be eligible for Federal aid, a State must develop a State rail services plan acceptable to the Secretary of Transportation, and comply with certain other statutory rquirements and with regulations to be issued by the Secretary.

In deciding how to implement the new abandonment provisions of the Interstate Commerce Act, the Commission has considered the local rail service assistance program. While recognizing that the States will need some time to prepare to take advantage of this program, the Commission has determined that there is no need to delay the processing of pending rail abandonment cases. Rela-

tively few of them are in the final stages where an "administratively final" Commission order is imminent. An order of the Commission's employee boards, commonly called review boards, becomes administratively final upon the failure of any party to seek reconsideration of a board's decision. The initial decision of an Administratve Law Judge becomes administratively final if exceptions are not filed, unless the decision is stayed by the Commission. In most instances, a decision of the Commission or a divison of the Commission becomes administratviely final on the date on which it is served.

While it is our intention to process pending abandonment cases to their conclusion, any finding that an abandonment should be authorized will be made subject to conditions to assure that any State or individual considering making an offer of financial assistance will be given time to pursue that end, in accordance with the time limits discussed below. It would facilitate the processing of these cases, and enable the Commission to better deal with rail assistance proposals if persons interested in making such proposals could make that fact known as early as possible in each abandonment proceeding. Any party considering the making of an offer of financial assistance may do so at any time during the pendency of the abandonment proceeding. Notice of the intention to offer financial assistance must be in written form, with appropriate reference to the proceeding involved, and must be served by certified mail upon the carrier seeking abandonment and first class mail upon all parties of record and the Commission.

It should be emphasized that submission of the notice of intent to offer financial assistancee will not be used as an element supporting a decision authorizing an abandonment. The purpose of the notice is to provide persons with the information necessary to decide whether to offer financial assistance; to afford the railroads an opportunity to provide the required information; and to facilitate the Commssion's action on the offer.

The Commission's Abandonment Procedure

In finding that any abandonment of rail freight service

should be authorized, the Commission will impose conditions giving full effect to the provision of the new law providing for the retention of service through rail service assistance payments. No certificate authorizing an abandonment will be issued until the finding that the abandonment should be authorized is served upon all parties and the governor of each State in which the trackage is located, and is published by notice in the Federal Register.

Issuance of the certificate of abandonment will be postponed for up to 6 months if, within 15 days of the publication of the Federal Register notice, the Commission receives notice that an offer of financial assistance has been made by a person shown to be financially responsible and determines that the offer is likely to cover the cost of acquiring all or part of the line or the losses incurred in operating the line plus a reasonable return on the value of the line.

The Commission will adopt the same conceptual approach developed by the Rail Services Planning Office in connection with the regional subsidy program authorized by the Regional Rail Reorganization Act of 1973 for the purposes of estimating the subsidy payment. It is recognized that there are statutory differences in the two programs. These differences relate primarily to the exclusion of a management fee in the national program, the inclusion of certain additional costs as set forth in section 1a(11) of the Interstate Commerce Act, and the basis upon which a reasonable return is to be calculated. The Commission will take these differences into consideration in establishing the subsidy payment. The Real Services Planning Office, whose address appears at the end of this notice, will provide copies of the standards as well as technical assistance to the railroads and to potential subsidizers in developing the estimates.

For the Commission to postpone the issuance of a certificate for a period not to exceed 6 months, to allow an offeror and the railroad to enter into a binding agreement for financial assistance, the notification to the Commission of an offer must include information sufficient to support

the statutory finding that the assistance offered is likely to cover the difference between the revenues attributable to the line of railroad and the avoidable cost of providing freight service over that line plus a reasonable return on the value of that line, or that it is likely to cover the acquisition cost of all or a portion of the line. The Commission is required by section 1a(6)(a)(ii) to make such a finding before postponing the issuance of a certificate.

When the Commission by order postpones issuance of a certificate for up to 6 months, the railroad and the offeror have that period to execute an assistance or acquisition and operating agreement. Upon notification that such a binding agreement has been executed, the Commission shall further postpone the issuance of a certificate for the period such an agreement is in effect, including extensions. The Commission's abandonment order will provide that issuance of a certificate of abandonment will be postponed if the railroad and the person offering assistance enter into a binding agreement for continued operations and that the postponement will be for the period of the agreement.

Such an agreement may be based on any form of financial assistance acceptable to the railroad and the person offering financial assistance. From time to time in abandonment proceedings before the Commission, railroads allege that the cost of rehabilitation necessary for efficient operation is so high that continued operations are economically infeasible. Therefore, instances may arise in which a railroad will accept an offer to finance rehabilitation of a line and will enter into a financial assistance agreement providing for continued operations on that basis. For example, a State or other interested person might rehabilitate the line, and the railroad, relieved of the rehabilitation cost, may then be able to operate the line at a profit. As previously noted rehabilitation costs paid for by a State may be eligible for reimbursement by the Federal Government.

If a binding agreement is not reached because of the railroad's refusal to accept an offer which the Commission finds sufficient to satisfy the statutory requirements for

continued operation under subsidy, the abandonment proceeding may be reopened within the 6 month postponement period so that the Commission, on the basis of the new facts, may reconsider the question of whether the abandonment should be authorized.

A further condition will be imposed that requires the railroad to make available its most recent reports on the physical condition of the line, and information makng it possible to compute an adequate rail services continuation payment, to any person notifying the railroad that he is considering making an offer of financal assistance requiring such information.

The certificate issued by the Commission in an abandonment proceeding will be made subject to such conditions as may be required by the public convenience and necessity, and shall include provisions for the protection of the interests of railroad employees.

Persons Offering Rail Service Assistance

Because of statutory time limits imposed upon the Commission, anyone making an offer of financial or other assistance in order to provide for the continuation of rail freight service that would otherwise be abandoned, should make certain that the Commission receives notice of such offer within 15 days of the publication in the Federal Register of notice of the finding that the abandonment should be authorized. That notification should include:

1. A copy of a firm offer to provide assistance, stating clearly the amount of money or other consideration offered and any terms or conditions to the offer. The offeror should certify that the offer has been made to the railroad.

2. Information demonstrating the financial responsibility of the person making the offer. The offeror should submit evidence demonstrating that it has, or will have at the time the proposed agreement is to be executed, appropriate authority, and the necessary funds, to enter into and fulfill contracts of the kind contemplated. If the offeror is not a government entity, the information demonstrating fi-

nancial responsibility must include, but need not be limited to:

(a) A balance sheet showing its financial condition as of the latest available date but no more than 6 months prior to the date of the notification to the Commission, and

(b) An income statement showing its revenues, expenses, and net income for the current calendar year to the latest available date and for each of the two preceding calendar years.

3. Information sufficient to support a finding by the Commission that the assistance being offered is likely to cover the difference between the revenues attributable to the line of railroad and the avoidable costs of providing rail fright service over the line, plus a reasonable return on the value of the line; or that it is likely to cover the cost of acquiring all or a portion of the line.

Railroads Seeking Abandonment Authority

A railroad which is an applicant for authority to abandon a line of railroad or a rail service shall be required to make available to any person informing it that it is considering offering financial assistance and requesting such information, within 10 days of receiving such notification whether such notification is received before or after the publication in the Federal Register

1. Its most recent reports on the physical condition of the line of railroad which is the subject of application.

2. A current report on the train service on the line and a current report on the traffic and revenue attributable to the line.

3. An actual computation of the extent to which the avoidable cost of providing rail freight service on such line of railroad, plus a reasonable return on the value of the rail propertiees involved, exceed the revenues attributable to such line of railroad, as determined by the Standards for Determining Rail Service Continuation Subsidies, 49 C.F.R. §1125.

The information described above shall either be furnished to the offeror of financial assistance or be made available for examination, during regular working hours, at a location within each State within which is located the line of ralroad which is the subject of the abandonment application or some other location acceptable to the offeror. Information concerning the nature, kind, quantity, destination, consignee, or routing of traffic shall, in the railroad's discretion, be made available to the offeror, provided all affected parties consent or disclosure is otherwise made in accordance with section 15(11) of the Interstate Commerce Act, 49 U.S.C. §15(11).

Compliance with Time Limits

In view of the statutory requirements imposed upon the Commission, all parties, both offerors of financial assistance and railroads seeking certificates for abandonment or discontinuance of lines of railroad, will be required to adhere strictly to the time limits set forth in this Notice. Failure to do so could prevent the Commission from making its required findings within the 30 day statutory per iod, and may result in an adverse decision to the party in default.

Rail carriers which have pending applications seeking authority to abandon or discontinue lines of railroad should consider, at least in proceedings under protest, supplementing their applications with the material necessary for parties to determine the possible requirements for rail service continuation payments or acquisition of the line in order to continue rail service. Persons considering making an offer of a rail continuation payment, in order to provide for continued service over a line for which a certificate for abandonment or discontinuance is being sought, should indicate their intention without delay—if possible, prior to the publication in the Federal Register of the Commission's findings.

In order to expedite the handling of submissions to the Commission, envelopes mailed to the Commission either by carriers or offerors should have the initials AB-RSCP

printed in the lower left hand corner, and the docket number of the proceeding, if known.

Further Information

Persons wishing information about the status of a particular abandonment proceeding or about the filing of pleadings, requests for leave to intervene, and similar procedural matters should contact the Section of Finance, Interstate Commerce Commission, 12th Street and Constitution Avenue, N.W., Washington, D.C. 20423 (telephone: 202-275-7245).

Persons desiring information about the rail freight services assistance program or about the computation of assistance payments should contact the Rail Services Planning Office, Interstate Commerce Commission, 1900 L Street, N.W., Washington, D.C. 20036 (telephone 202-254-3281).

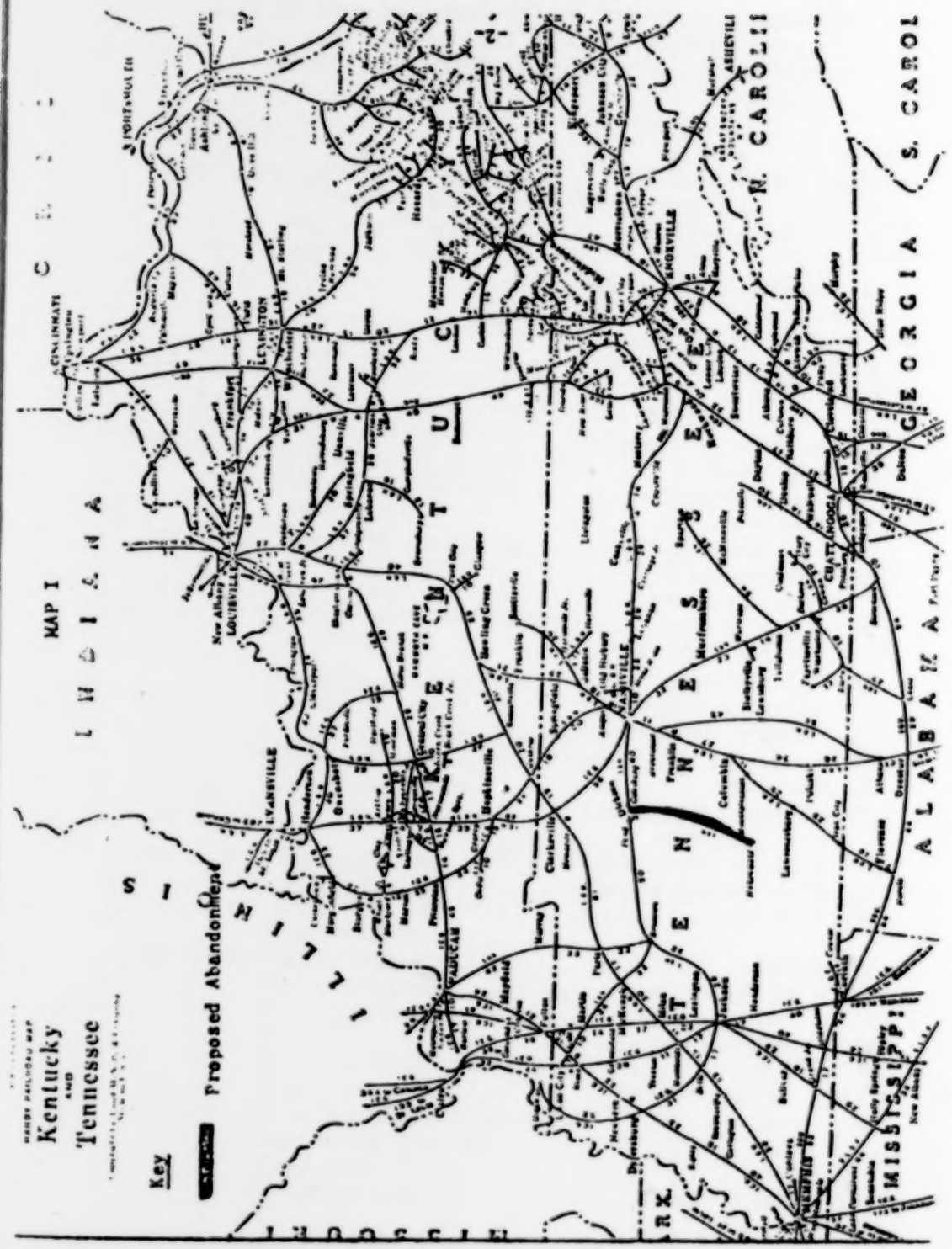
By the Commission.

Dated March 24, 1976.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX A



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APPENDIX B

FREIGHT HANDLED TO AND FROM POINTS ON THE CENTERVILLE BRANCH AND POINTS BEYOND ORIGINATED OR TERMINATED TRAFFIC (NOTE A)

STCC Number	Description	1973 Cars	1973 Tons	1974 Cars	1974 Tons	Jan.-Sept.* 1975 Cars	Jan.-Sept.* 1975 Tons
01	Farm Products	3	276	...	.....	...	.....
08	Forest Products	5	192	3	107	2	60
11	Coal	7	478	3	208	...	.....
14	Non-Metallic Minerals	5	291	...	.....	5	400
20	Food or Kindred Products	2	65	3	108	...	.....
22	Textile Mill Products	2	15	...	.....	1	15
24	Lumber or Wood Products	1,097	54,497	739	38,745	295	13,510
25	Furniture or Fixtures	1	60	...	.....	...	.....
26	Pulp, Paper or Allied Products	1	45	...	.....	...	.....
28	Chemicals or Allied Products	69	4,246	88	5,795	63	3,890
29	Petroleum or Coal Products	20	370	9	188	5	151
30	Rubber or Misc. Plastic Products	....	.....	1	10	2	44
32	Clay, Concrete, Glass or Stone	59	2,713	58	2,451	37	1,616
33	Primary Metal Products	25	1,222	8	454	3	101
34	Fabricated Mill Products	5	92	6	151	...	.....
35	Machinery	1	10	...	.....	...	.....
36	Electrical Machinery or Equipment	1	74	1	11	1	9
40	Waste or Scrap Material	3	79	2	38	3	60
41	Misc. Freight Shipments	...	.....	2	55	...	.....
46	Misc. Mixed Shipments	2	125	21	1,018	...	.....
	TOTAL	1,308	64,850	944	49,339	417	19,856

(NOTE A)—There were no less than carload shipments for any of above periods.

*Total traffic for 1975 was 580 CL.

APPENDIX C

LOUISVILLE AND NASHVILLE RAILROAD COMPANY CENTERVILLE, TENNESSEE BRANCH AVOIDABLE EXPENSES BY I.C.C. ACCOUNTS FOR THE YEARS 1973, 1974 AND THE PERIOD JANUARY THROUGH SEPTEMBER, 1975

ICC Account Number	Expense Description	1973	1974	Jan.-Sept. 1975
	Maintenance of Way and Structures			
202	Roadway Maintenance	$ 2,421	$ 2,693	$ 446
208	Bridges, Trestles and Culverts	3,483	7,847	546
212	Ties	7,257	2,183	.....
214	Rails	109	148	.....
216	Other Track Material	595	550	.....
218	Ballast	160	.....	.....
220	Track Laying and Surfacing	11,214	4,439	9,437
227	Station and Office Buildings	165	.....	.....
229	Roadway Buildings	.....	286	95
266	Road Property Depreciation	4,062	4,062	3,047
273	Public Improvements, Maintenance	787	.....	.....
277	Employees' Health & Welfare Benefits	906	725	716
	Total Maintenance of Way & Structures	$ 31,159	$ 22,933	$ 14,287
	Maintenance of Equipment			
311	Locomotive Repairs	$ 6,906	$ 6,491	$ 4,463
314	Freight Train Car Repairs	11,799	7,822	4,756
331	Equipment—Depreciation	17,396	12,453	8,602
335	Employees' Health & Welfare Benefits	558	391	252
	Total Maintenance of Equipment	$ 36,659	$ 27,157	$ 18,073
	Transportation			
373	Station Employees	$ 1,702	$ 1,656	$ 1,061
376	Station Supplies	215	213	208
392	Train Enginemen	18,396	17,973	14,983
394	Train Fuel	5,685	10,925	7,514
400	Servicing Train Locomotives	1,374	1,368	941
401	Trainmen	36,168	33,913	24,714
402	Train Supplies and Expenses	339	134	152
404	Signals and Interlockers	71	92	54
409	Employees' Health & Welfare Benefits	3,196	2,952	2,244
	Total Transportation	$ 67,146	$ 69,226	$ 51,871

	Income Accounts—Debit			
532	Railway Tax Accruals			
	(a) Payroll Taxes	$ 9,611	$ 11,377	$ 8,893
	(b) Ad Valorem Taxes	18,927	21,060	15,795
536	Hire of Freight Cars	3,818	6,036	3,082
	Total Income Accounts—Debit	$ 32,356	$ 38,473	$ 27,770
	Total Avoidable Expenses on Branch	$167,320	$157,789	$112,001

APPENDIX D

LOUISVILLE AND NASHVILLE RAILROAD COMPANY EFFECT ON NET RAILWAY OPERATING INCOME UPON ABANDONMENT OF CENTERVILLE BRANCH FOR THE YEARS 1973, 1974 AND THE PERIOD JANUARY THROUGH SEPTEMBER, 1975

	1973	1974	Jan.-Sept. 1975
L&N Gross Revenue Earned from Traffic to or from Points on the Line Proposed to be Abandoned and also Handled on other Portions of the L&N System			
I.C.C. Account 101—Freight	$258,666	$269,934	$118,374
I.C.C. Account 137—Demurrage	1,390	130	170
Total System Revenue	$260,056	$270,064	$118,544
L&N Gross Revenue Assignable to the Centerville Branch			
I.C.C. Account 101—Freight	$ 33,104	$ 31,566	$ 15,390
I.C.C. Account 137—Demurrage	1,390	130	170
Total Revenue Assignable to Branch	$ 34,494	$ 31,696	$ 15,560
L&N Gross Revenue Assignable to other Portions of the L&N System			
I.C.C. Account 101—Freight	$225,562	$238,368	$102,984
Avoidable Expenses on Branch			
Maintenance of Way and Structures	$ 31,159	$ 22,933	$ 14,287
Maintenance of Equipment	36,659	27,157	18,073
Transportation	67,146	69,226	51,871
Income Accounts—Debit	32,356	38,473	27,770
Total Avoidable Expenses on Branch	$167,320	$157,789	$112,001
Net Profit or (Loss) from Operating Branch Line	($132,826)	($126,386)	($ 96,727)
Net Profit when using 50% Rule of I.C.C. on L&N Gross Revenue Assignable to other Portions of the L&N System			
I.C.C. Account 101—Freight	$112,781	$118,184	$ 51,492
Net Profit or (Loss) to System	($ 20,045)	($ 6,909)	($ 44,949)
Net Effect on Operating Income upon Abandonment	$ 20,045	$ 6,909	$ 44,949

Supreme Court, U. S.
FILED
MAR 22 1978
MICHAEL RODAK, JR., CLERK

77-1085

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. A-335

AMERICAN BILTRITE, INC., TENNESSEE PUBLIC SERVICE COMMISSION, DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT OF THE STATE OF TENNESSEE, CITY OF CENTERVILLE, CITY OF HOHENWALD, AND HICKMAN AND LEWIS COUNTIES, TENNESSEE,

Petitioners,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WANDALEEN POYNTER

500 Water Street
Jacksonville, Florida 32202

Counsel for Respondent Louisville and Nashville Railroad Company

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IN THE
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October Term, 1977

No. A-335

AMERICAN BILTRITE, INC., TENNESSEE PUBLIC SERVICE COMMISSION, DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT OF THE STATE OF TENNESSEE, CITY OF CENTERVILLE, CITY OF HOHENWALD, AND HICKMAN AND LEWIS COUNTIES, TENNESSEE,

Petitioners,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND LOUISVILLE AND NASHVILLE RAILROAD COMPANY,

Respondents.

Respondents, United States of America and Interstate Commerce Commission, are the original Respondents below. Louisville and Nashville Railroad Company ("L&N") was permitted, without objection, to intervene as a Respondent below. As an Intervenor, L&N is properly deemed a Respondent in this Court.

L&N opposes the issuance of a Writ of Certiorari from this Court to the United States Court of Appeals for the Sixth Circuit.

QUESTIONS PRESENTED

Petitioners' arguments do not relate to the questions

they have stated at Page 2 of their Petition. Neither the questions presented or the arguments made are worthy of review by this Court.

Chronological Outline of Critical Procedural Steps

October 1, 1973	Application filed pursuant to §1 (18)-(20) of the Interstate Commerce Act for authority to abandon.
September 9, 1975	Commission required the publication of a prepared notice to the public stating that the authority requested would not result in an adverse effect on the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.
December 10, 1975	Order was served setting the matter for hearing before an Administrative Law Judge on January 14, 1976.
January 14-16, 1976	Hearing was held before an Administrative Law Judge at Nashville, Tennessee.
**February 5, 1976	Railroad Revitalization and Regulatory Reform Act became law.
May 27, 1976	The Commission served an initial decision of the Administrative Law Judge finding that public convenience and necessity requirements of the communities which would be affected by the abandonment did not require continued operation, and that, therefore, a Certificate of Public Convenience and Necessity authorizing abandonment of the line should be issued.

December 1, 1976	An order dated November 18, 1976, was served by the Commission in which the Commission adopted the Statement of Facts, the conclusions and the findings of the Administrative Law Judge as their own and affirmed the decision. This order was issued after an administrative appeal was taken within the Commission, *i.e.*, the filing of a Petition for Reconsideration and Replies thereto.
December 20, 1976	The Tennessee Public Service Commission, ("TPSC") the Department of Economic and Community Development, the Counties of Lewis and Hickman and the Cities of Hohenwald and Centerville petitioned the United States Court of Appeals for the Sixth Circuit for review. Simultaneously the TPSC filed with the Interstate Commerce Commission a Petition for a Stay Pending Judicial Review.

December 23, 1976	The Commission issued an order dated December 1, 1976, declining to stay the effectiveness of the order citing the availability of sufficient relief through existing procedures to alleviate the problems outlined in the request for a stay.
January 4, 1977	The TPSC, *et al.*, filed with the Sixth Circuit Motion for Stay Pending Review.
January 26, 1977	American Biltrite, Inc., a protestant below, filed for Leave to Intervene in the Sixth Circuit proceeding. The motion was denied, without date, by the Clerk of the Court as filed outside the time limits contemplated in the Court's rules.
February 28, 1977	The Court granted the Motion for Stay Pending Review conditioned upon the proviso that petitioners not delay the appellate progress of the case. In the same order an expedited briefing schedule was set by the Court.
March 15, 1977	American Biltrite, having appealed the decision denying intervention, was allowed to intervene on March 15, 1977, six days after the date for filing of the petitioners' brief. Briefing dates were rescheduled.

June 16, 1977	Oral argument was had before the Sixth Circuit Court of Appeals. The Interstate Commerce Commission, L&N, the Tennessee Public Service Commission and American Biltrite participated.
June 21, 1977	Willamette Industries, Inc., successor in interest to Fibreboard Corporation, a protestant below, filed for leave to intervene *amicus curiae* and to file a brief.
June 27, 1977	The Court denied the Motion for Intervention filed by Willamette Industries, Inc., and affirmed the Commission's actions finding that the order of the Commission was reasonable and supported by substantial evidence.
July 10, 1977	The Tennessee Public Service Commission, *et al.*, filed a Petition for Rehearing with the Court.
July 25, 1977	Petition for Rehearing was denied.
October 25, 1977	Commission entered the Certificate and Order authorizing abandonment and finding specifically that a bona fide offer of financial assistant had not been made.

STATUTES INVOLVED

49 U.S.C.A. §1a, a new section of the Interstate Commerce Act created by §802 of the Railroad Revitalization and Regulatory Reform Act ("4R Act")[1]/ states at 1a(8):

> "(8) Petitions for abandonment or discontinuance which were filed and pending before the Commission as of the date of enactment of this section or prior to the promulgation by the Commission of regulations required under this section shall be governed by the provisions of Section 1 of this Act which were in effect on such date of enactment, except that paragraphs (6) and (7) of this section shall be applicable to such petitions."

Sections 1a(6) and (7) read in their entirety as follows:

> "(6)(a) Whenever the Commission makes a finding in accordance with this section, that the public convenience and necessity permit the abandonment or discontinuance of a line or railroad, it shall cause such finding to be published in the Federal Register. If, within thirty (30) days of such publication, the Commission further finds that —
>
> (i) a financially responsible person (including a government entity) has offered financial assistance (in the form of a rail service continuation payment) to enable the rail service involved to be continued; and
>
> (ii) it is likely that such proffered assistance would —
>
> (A) cover the difference between the revenues which are attributable to such line of railroad and the avoidable cost of providing rail freight service on such line, together with a reasonable return on the value of such line; or

1/ Public Law 94-210, 90 Stat. 31

> (B) cover the acquisition cost of all or any portion of such line of railroad;
>
> The Commission shall postpone the issuance of a certificate of abandonment or discontinuance for such reasonable time, not to exceed six months, as is necessary to enable such person or entity to enter into a binding agreement, with the carrier seeking such abandonment or discontinuance, to provide such assistance or to purchase such line and to provide for the continued operation of rail services over such line. Upon notification to the Commission of the execution of such an assistance or acquisition and operating agreement, the Commission shall postpone the issuance of such a certificate for such period of time as such an agreement (including any extensions or modifications) is in effect.
>
> (b) A carrier by railroad subject to this part shall promptly make available, to any party considering financial assistance in accordance with subdivision (a), its most recent reports on the physical condition of any line of railroad with respect to which it seeks a certificate of abandonment or discontinuance, together with such traffic, revenue, and other data as is necessary to determine the amount of assistance that would be required to continue rail service.
>
> "(7) Whenever the Commission finds, under paragraph (6)(a) of this section, that an offer of financial assistance has been made, the Commission shall determine the extent to which the avoidable cost of providing rail service plus a reasonable return on the value of the rail properties involved exceed the revenues attributable to the line of railroad or the rail service involved."

The portions of Section 1 of the Interstate Commerce

Act which controlled abandonments prior to the amendments effected by Section 802 *et seq.* of the 4R Act state:

> "(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.
>
> (19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

> "(20) The Commission shall have the power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in in-

terest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

DECLARATION OF PURPOSE AND POLICY OF THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT

Sec. 101. (a) Purpose.—It is the purpose of the Congress in this Act to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States, and to promote the revitalization of such railway system, so that this mode of transportation will remain viable in the private sector of the economy and will be able to provide energy-efficient, ecologically compatible transportation services with greater efficiency, effectiveness, and economy, through—

(1) ratemaking and regulatory reform;

(2) the encouragement of efforts to restructure the system on a more economically justified basis, including planning authority in the Secretary of Transportation, an expedited procedure for determining whether merger and consolidation applications are in the public interest, and continuing reorganization authority;

(3) financing mechanisms that will assure adequate rehabilitation and improvement of facilities and equipment, implementation of the final system plan, and implementation of the Northeast Corridor project;

(4) transitional continuation of service on light-density rail lines that are necessary to continued employment and community well-being throughout the United States;

(5) auditing, accounting, reporting, and other requirements to protect Federal funds and to assure repayment of loans and financial responsibility; and

(6) necessary studies.

(b) Policy.—It is declared to be the policy of the Congress in this Act to—

(1) balance the needs of carriers, shippers, and the public;

(2) foster competition among all carriers by railroad and other modes of transportation, to promote more adequate and efficient transportation services, and to increase the attractiveness of investing in railroads and rail service-related enterprises;

(3) permit railroads greater freedom to raise or lower rates for rail services in competitive markets;

(4) promote the establishment of railroad rate structures which are more sensitive to changes in the level of seasonal, regional, and shipper demand;

(5) promote separate pricing of distinct rail and rail-related services;

(6) formulate standards and guidelines for determiming adequate revenue levels for railroads; and

(7) modernize and clarify the functions of railroad rate bureaus.

COUNTERSTATEMENT OF THE CASE

To the extent the facts are stated by Petitioners, L&N agrees, however, there are certain critical facts omitted which take on a special significance in light of the arguments which have been made by Petitioners.

As Petitioners have indicated, L&N filed Application for Authority to Abandon, pursuant to Section 1(18)-

(20)[2]/ of the Interstate Commerce Act on October 1, 1973. No action, however, was taken on the Application by the Commission until September 9, 1975, almost two years later, when L&N was required to publish a notice advising the public that the Commission had determined that the authority, if granted, would not result in an adverse effect on the quality of the human environment within the meaning of the National Environmental Policy Act of 1969. The Commission was delayed in processing the Application because of the decision, and subsequent appeals of the decision, in *Harlem Valley Transportation Association v. Stafford,* 360 F. Supp. 1057 (S.D.N.Y. 1973), *aff'd* 500 F.2d 328 (1974). The delay was, therefore, apparently occasioned by a backlog of cases which had accumulated during a Commission-imposed moratorium on abandonments pending completion of the appeal, and subsequent organization of an independent department to prepare the environmental threshold assessment surveys (ETAS). It is critical that the Court recognize this basic fact since Petitioners have alleged that the filing of the Application itself resulted in the deterioration of traffic which lead, in part, to the Commission's finding that the authority to abandon should be granted.

Further, the record in the Commission proceeding, as outlined by the Administrative Law Judge (ALJ), shows that the decrease in traffic on the Centerville Branch started as early as 1966 and decreased to a critical level long before the ultimate decision was made to file application for authority to abandon. (Appendix A, p. 5)

2/ 49 U.S.C.A. §§1(18)-(20) [Prior to amendment on February 5, 1976]

REASONS FOR DENYING THE PETITIONERS' REQUEST FOR THE ISSUANCE OF A WRIT

Contrary to the Opening Statement of Petitioners in the "Argument" section of their Petition, this case does not involve vital issues regarding the abandonment of railway lines in the United States. There is nothing unusual or significant about the case and it has been handled correctly by the Interstate Commerce Commission, as affirmed by the United States Court of Appeals for the Sixth Circuit. Admittedly the case before the Commission was a "transition" case; one of many abandonment applications filed and heard before 49 U.S.C.A. §1a became effective, but ruled on after it became effective.

Petitioners are simply incorrect in stating that all the provisions of the Railroad Revitalization and Regulatory Reform Act were controlling in the consideration of L&N's Application to Abandon. Section 1a, by its own terms, has only limited applicability to "prior filed" cases. At §1a(8) application was specifically abrogated "except that Paragraphs (6) and (7) of this Section shall be applicable to such petitions." Sections 1a(6) and (7) deal solely with commission monitoring of subsidy and purchase offers made to a petitioning railroad *after the Commission has found that the public convenience and necessity require the abandonment* of a railroad or segment of railroad.

There are then, three reasons this Court should deny the Petitioners' request for the issuance of a Writ:

1) Petitioners' entire argument is based on the erroneous position that all of the provisions of the 4R Act applied to the case.

2) Petitioners have not raised either before the Commission, before the Circuit Court or even before this Court a question of improper handling by the Commission of those subsections of Section 1a that did apply to the proceeding.

3) Even if Petitioners were correct in their argument that the burden of proof in abandonment cases has been changed by the 4R Act, *and they are not,* review by this Court would require an attempted application of procedural requirements in a statute which became effective in February, 1976, to a hearing held in January, 1976.

THE ADMINISTRATIVE LAW JUDGE APPLIED AN APPROPRIATE STANDARD IN DETERMINING WHETHER THE PUBLIC CONVENIENCE AND NECESSITY REQUIRED CONTINUED OPERATION OF THE BRANCH.

Petitioners argue that an inappropriate finding has been made because the 4R Act changed the burden of proof in abandonment cases and that, therefore, the Administrative Law Judge committed error when she "weighed" evidence in reaching a final conclusion on the merits of abandonment. Since railroads have been required to carry the burden of proof in abandonment cases since the passage of the Transportation Act of 1920[3]/, the 4R Act has not in any way altered or shifted the burden of proof as Petitioners would lead this Court to believe. Petitioners' confusion arises not from a change in burden of proof but a change in the "weighing" factor, which is no longer valid

3/ As relevant to this petition the Transportation Act of 1920 included 49 U.S.C.A. §1(18)-(20).

now that relief for those interested in retaining the line is available through Sections 1a(6)-(7). These subsections, the Court will recall, do apply to the abandonment which is in question.

The Administrative Law Judge did an admirable job of handling a difficult "transition" case. On one hand she was required by law to apply the standards of *Colorado v. U.S.*, 271 U.S. 153 (1926), in reaching a final determination on the public convenience and necessity requirements. On the other hand she was required to extend to the public and the railroads the subsidy/purchase "relief" provisions of the 4R Act. Under Section 1(18)-(20), as this Court found in *Colorado*, the Commission was to weigh the past, present and prospective burden on interstate commerce in the context of the need for an efficient and healthy transportation system, against the local interest in retaining the line. Once a burden on interstate commerce was established, the abandonment could be authorized unless injury to local interest as a result of the abandonment was of such magnitude as to outweigh the beneficial results of the elimination of the burden. The weighing of facts to which the Administrative Law Judge refers (Appendix A, p. 19), could take place, and obviously did take place, only after L&N carried its burden of proof by establishing a burden on interstate commerce.[4]/ Therefore, pre-4R Act, the Commission was compelled to force a railroad to continue a deficit operation, even if

4/ *Abandonment of F. & C. Ry.*, 86 I.C.C. 740, 749-750. (1923) *Abandonment of Branch by P.M. Ry.*, 72 I.C.C. 303,307. (1922) *S.P. Co. Abandonment*, 320 I.C.C. 38, 42. (1963) [Reference to these cases, selected to illustrate the continuing position of the Commission that railroads carry the burden of proof in abandonment cases, establishes that there has been no change mandated by the 4R Act].

it created a burden on interstate commerce, if the public harm was greater. The 4R Act *does not alter the burden on a railroad to prove that continued operation of the line is a burden on interstate commerce,* but does offer some relief to the railroads by providing alternatives to continued deficit operation of a line by them. Through subsidy payments which shippers or political units would provide, or through complete divestiture of the line by sale to another qualified operator, the intent of the 4R Act is carried out. It is not rational to conclude that Congress would mandate the continuation of all loss-producing lines to "revitalize" the nation's railroads. Revitalization was to be facilitated, in part, through Section 1a(6) and (7) of the 4R Act to provide "transitional continuation of service on light-density rail lines that are necessary to continued employment and community well being throughout the United States . . ."[5]/ relieving the railroads of the burden.

EVEN THOUGH THERE WAS A FAILURE BY PETITIONERS PROPERLY TO APPROACH THE COMMISSION UNDER THE SUBSIDY/ PURCHASE PROVISIONS OF SECTION 1a, L&N HAS INDEPENDENTLY ENTERED INTO AN INTERIM SUBSIDY AGREEMENT WITH THE STATE OF TENNESSEE.

Only one of the Petitioners, American Biltrite, Inc., actually made an attempt to take advantage of negotiation under Section 1a(6)-(7) and the Commission properly found that the offer which was made was not a bona fide offer. Appendices F and G show the complete factual presentation which was made to the Commission by both sides.

5/ 4R Act §101(a)(4).

Even though the Commission issued a Certificate of Public Convenience and Necessity authorizing the abandonment of the line, effective October 25, 1977, L&N entered into an agreement with the State Tennessee, through its designated State Rail Planning Office, to continue subsidized operation until the State was in a position to formulate its State Rail Plan[6]/ and to determine if assistance to the local communities should be provided by the State to enable them to either subsidize or purchase the operation. The Agreement, Appendix H, shows that the State of Tennessee, through two separate departments, the Department of Transportation and the Public Service Commission, is apparently working in two opposite directions with L&N involving continuation of operations.

L&N's willingness to enter into an agreement with the State of Tennessee to forego abandonment until appropriate action could be taken to determine the State's willingness or lack of willingness to take over operations of the line, removes even any equitable argument on the part of Petitioners that they have been deprived of the protection of provisions of the 4R Act.

6/ Local Rail Service Assistance was a concept created by Section 803 of the 4R Act. From the excerpt quoted below the total intent of Congress concerning continuation of light-density lines is clear.

Sec. 803(f) The Secretary shall, in accordance with this section, provide financial assistance to States for rail freight assistance programs that are designed to cover—

"(1) the cost of rail service continuation payments;

"(2) the cost of purchasing a line of railroad or other rail properties to maintain existing or provide for future rail service;

"(3) the cost of rehabilitating and improving rail properties on a line of railroad to the extent necessary to permit adequate and efficient rail freight service on such line; and

"(4) the cost of reducing the costs of lost rail service in a manner less expensive than continuing rail service.

CONCLUSION

Contrary to the views expressed by Petitioners, the Congressional intent in the passage of the 4R Act was not to prevent railroad abandonments or shift the burden of proof in an abandonment case, but to extend to the public certain relief from abandonment through financial contributions from federal and state governments. The 4R Act also, by its provisions, required the initiation of state as well as federal interest in the continuation of low-density lines, thereby relieving railroads of the sole responsibility for evaluation of need for rail service and from the burden of continuing unprofitable operations to the detriment of entire rail systems.

While speculation, it does appear that an early argument advanced by L&N on the basis of a then-existing "34 Car Rule"[7]/ rebuttable presumption in favor of abandonment may have confused Petitioners on the nature of proof required and which party or parties were required to supply it. The ALJ, in L&N's opinion, completely rejected the argument for application of the rebuttable presumption in favor of abandonment. However, even if the argument had been accepted and the application considered as one controlled by rebuttable presumption, it is clear that L&N was not relieved of its burden of proof as indicated by the following Commission observation:

7/ A complete discussion of the "34 Car Rule" regulations can be found in *Pennsylvania v. U.S.*, 361 F. Supp 208 (1973), where the Court upheld the regulations and found that only a "burden of going forward" had been placed on protestants to an abandonment, not the burden of proof. This Court affirmed the decision [414 U.S. 1017 (1973)]

> "The 34-Carload Rule does not shift the burden of persuasion which remains with the carrier as the party claiming affirmative relief. Its effect is merely to shift to the Protestants the burden of going forward with the evidence . . . . Applicant's evidence of fewer than 34 carloads of traffic per mile creates a rebuttable presumption in favor of abandonment. An opposing party can refute this presumption by evidence showing that there were, in fact, more than 34 carloads of traffic per mile per year carried over the lines sought to be abandoned or that benefits to a particular community or shipper or to several communities or shippers of the continued operation outweighs the burden upon the carrier and interstate commerce. Stated otherwise, the Commission must balance the immediate and local interest of the community and shippers against the burden imposed upon the carrier and interstate commerce if operations continue. See *Colorado v. United States*, 271 U.S. 153 (1926) and *State of Nebraska v. United States*, 255 F.Supp. 718 (Nebr. 1966).

The above quote was taken from *Marianna and Blountstown R. Abandonment*, 348 I.C.C. 507, 510 (1973) and indicates that the railroad continued to carry the burden of proof even when the presumption that an abandonment should be approved was considered legitimately established. Even a fleeting look at the resume' of L&N's evidence in the Initial Decision (Appendix A, pp. 3-6) indicates that L&N provided substantially more justification for abandonment than a showing that a specific number of cars moved over the line during a specific period of time or only that a loss had been sustained. The abandonment was not, as characterized by Petitioners, "left to the discretion of rail carriers alone."

It is obvious that Petitioners have not raised one legitimate issue for review by this Court and the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Original Signed By
Ms. Wandaleen Poynter
500 Water Street
Jacksonville, Florida 32202

Counsel for Louisville and Nashville Railroad Company

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(Service Date: May 27, 1976)

INITIAL DECISION

No. AB-2 (Sub-No. 5)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY ABANDONMENT BETWEEN COLESBURG AND HOHEWALD IN DICKSON, HICKMAN AND LEWIS COUNTIES, TENN.

Public convenience and necessity shown to permit abandonment by Louisville and Nashville Railroad Co. of its Centerville Branch. Conditions prescribed. Issuance of a certificate withheld pending compliance with Public Law 94-210.

Fred R. Birkholz and *Wandaleen Poynter* for applicant.

E. Warner Bass, Douglas T. Bates, James N. Clay, H. J. Coffey, Joseph T. Hester, William Landis Turner and *Eugene W. Ward* for protestants.

By Brenda P. Murray, Administrative Law Judge:

This is an application by the Louisville and Nashville Railroad Co. (L&N or Railroad), filed October 1, 1973,[1]/ under section 1 (18)-(20) of the Interstate Commerce Act, for a certificate of public convenience and necessity permitting the abandonment of that portion of railroad which turns out of the L&N's Nashville to Bruce-

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1/ The delay in processing resulted from court appeals in *Harlem Valley Transportation Ass'n v. Stafford*, 360 F. Supp. 1057 (S.D.N.Y. 1973) aff'd 500 F. 2d 328 (1974).

ton main line at Colesburg, Dickson County, Tenn., and extends in a southwesterly direction from Mile Post (M.P.) 2 at Colesburg, through Hickman County to just south of M.P. 52 near Hohenwald, Lewis County, Tenn., a distance of approximately 50.5 miles (Centerville Branch).[2]/

The Commission's staff issued an "environmental threshold assesment survey" which found that no significant impact on the environment would result from abandonment of the line.[3]/ This assessment was widely publicized and comments requested. Based on the staff assessment and the comments received, the Commission found in an order served September 15, 1975, that an "environmental impact statement" need not be issued because the proceeding did not present a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. #4321, et seq.

Notice of the proposed abandonment was posted and served as required under the act and the Commission's regulations. Protests were filed and the matter was referred to me for hearing and preparation of an initial decision. A hearing was held on January 14-16, 1976, at Nashville, Tenn., at which the application was opposed by American Biltrite, Inc., Brotherhood of Locomotive

2/ The Railroad intends to leave the line in place to M.P. 5. It will be reclassified as an industrial spur and will serve the proposed Dickson Industrial Park. The application covers the total branch.

3/ The survey noted that the Tennessee Department of Conservation wants to use the right-of-way for recreational purposes as part of the Natchez Trace Trail. If the abandonment is approved, the L&N is agreeable to a condition which would keep the property under the track intact for 90 days pending an offer of purchase for recreational purposes.

Engineers, Brotherhood of Maintenance of Way Employees, City of Hohenwald, Tenn., Department of Economic and Community Development of the State of Tennessee, Fibreboard Corporation, Hickman County, Tenn., J. M. Huber Corp., Lewis County, Tenn., Tennessee Public Service Commission and the United Transportation Union. The Brotherhood of Locomotive Engineers withdrew its opposition based on the railroad's acceptance of the Burlington conditions.

Most of the parties filed briefs which were due March 22, 1976.[4]/

APPLICANT

The single track line of railroad proposed for abandonment is a 50.5 mile stub-end branch line which turns out of the L&N's main line between Nashville and Bruceton, Tenn., at Colesburg, Dickson County and runs north-south about 40 miles west of Nashville. See Appendix A. The line is entirely within the state of Tennessee. It serves the following prepaid stations: Pomona, Tidwell, Lyles (pop. 500), Brown, Nunnelly (pop. 200), Elkins, Centerville (pop. 2,592), Deans, Watson, Buffalo, Theodore and Hohenwald (pop. 3,385).[5]/ The line consists of 80, 90 and 102 pound rail with approximately two miles of 62 and 68 pound rail located between M.P. 38 and 39 and M.P. 33 and 34, respectively. The line has had a maximum speed limit of 10 m.p.h. since 1969. The

4/ Applicant's brief arrived at the Commission on March 28, 1976. Its request to be allowed to file this brief late is granted.

5/ Population figures are from the 52nd edition of the Rand McNally Road Atlas.

weight restriction on the line is 220,000 pounds per gross car. The line has numerous grades that exceed 2 percent,[6]/ numerous curves that exceed 15 degrees,[7]/ 7 wooden trestles and 12 bridges. The L&N uses an F-7 locomotive on the line and the average train has 15 cars. It is not possible to add more power and run longer trains because of the curves and grades.

The line is served by a mobile agent out of Bruceton. In January, 1976, service was reduced from triweekly to once a week. A round trip on the Branch takes between 10 and 12 hours. When the service was triweekly, it was performed by a regular crew consisting of an engineer, a conductor and a brakeman who received two days pay.[8]/ It is now performed by an "extra crew". The engineer is based in Dickson but the other three people are out of Nashville and get deadhead time for the 80 mile trip it takes to get to and from Dickson.

The line has no local traffic and, of course, as a stub-end line it does not have any overhead traffic. In 1973, 1,308 carloads either originated or terminated on the line; in 1974, 944 carloads and in 1975, 580 car-

6/ Exhibit 22 shows the location on the line by Mile Post designation of 150 spots where the grade exceeds 2 percent. These total 16.54 miles.

7/ Tr. page 335-336, gives Mile Post designation for 14 curves that exceed 15 degrees.

8/ The Federal Hours of Service Law requires that a train crew can be on duty a maximum of 12 hours. In the opinion of the L&N's General Manager Transportation, it is hard to travel 101 miles at 10 m.p.h. and do the required switching in 12 hours so that crews usually get a day's pay for going out and one for coming back.

loads.[9]/ Most of the traffic was either lumber or wood products or chemicals or allied products. A breakdown of traffic by commodity (Standard Transportation Commodity Code) is shown on Appendix B. This traffic yielded revenue to the rail industry of $376,300 in 1973; $433,500 in 1974 and $201,300 for the first nine months of 1975. Of these totals, the L&N received $258,700 in 1973; $270,000 in 1974 and $118,400 for the first nine months of 1975.

A railroad study of the line in 1965 showed that it was profitable by $50,000 or $60,000. Traffic declined considerably after July, 1966, when a shipper which generated 64 percent of the line's traffic, Tennessee Products and Chemical Corp., at Lyles went out of business.

The L&N figures the total avoidable on branch costs to be $157,789 for 1974. This figure includes actual expenses spent on the maintenance of way and structures ($22,933) and a per mile allocation to ascertain a figure for the maintenance of equipment ($27,157) and transportation ($69,226)[10]/ Using this total avoidable cost figure ($157,789) and assigning revenue to the line on the basis of car miles traveled over the Branch as compared with car miles over the rest of the L&N system ($31,696), the line lost $126,093 in 1974. Taking the total revenue earned to the L&N from traffic originating or terminating on the line ($270,064) and total avoidable expenses (on Branch of $157,789 and off Branch of $119,184, using the

9/ Tr. page 31-32, these figures covered cars where the interline settlements were received in the time period given. There is no reason to believe that actual car moves would differ significantly.

10/ Transportation includes ICC Accounts Nos. 373—Stations Employees and 376—Station Supplies. There are actual expense figures.

I.C.C.'s 50 percent rule to estimate off line expenses),[11/] the line lost $6,909 the same year. The Railroad sees this figure as the benefit to it if the line had been abandoned in 1974. Using figures for January-September 1975, the line lost $44,949. The railroad's avoidable expenses and effect on operating income are shown on Appendix C and D.

All of these calculations are based on the expense of tri-weekly service. Based on service once a week and using the traffic for 1974, the railroad would have broken even in that year and in 1975, based on 1975 traffic, would have lost $41,000.

The L&N admits that the line is now in poor condition. It has not performed a great deal of rehabilitation, hoping for a favorable determination of this application. It is able to maintain the line at minimum standards (10 m.p.h.) by performing spot maintenance; however, a general rehabilitation would involve replacing the light rail (9,244 linear feet), general retimbering, full stabilization and ditching to assure proper drainage. The result would put the line substantially above FRA Class I standards, but the physical conditions would prevent speeds over 25 or 30 m.p.h. The estimated cost of this rehabilitation and maintenance would be $602,100 expended over five years.

The railroad does not consider the area served by the Branch to be attractive for industrial development by

11/ The L&N contends that off Branch expenses would be higher using costs for the southern region in the I.C.C.'s Bureau of Accounts, "Rail Carload Cost Scales by Territories for the year 1973", Statement No. 101-73, Washington, D. C., August, 1975.

companies who will use the railroad. It has not attempted to attract industry to this location since 1973 but even before then it did not enjoy much success in convincing companies to locate in this area. Since 1966 only one rail user has located on the line.

The L&N's balance sheet dated September 30, 1975, shows total assets and liabilities, including shareholder's equity, of $1.3 million. Its income account shows net income transferred to retained income-unappropriated of $25.5 million in 1973, $37 million in 1974 and $16.9 million for the first nine months of 1975.

Between 1965 and 1974 the railroad's operating revenues have gone up 221 percent, from $274,613,000 to $607,231,000, while its operating expenses increased 225 percent, 4 percent more, from $236,901,000 to $533,151,000.

The L&N is agreeable to the imposition of the Burlington conditions for the protection of employees on the Centerville Branch.

PROTESTANTS

The Department of Economic and Community Development of the State of Tennessee was created by Chapter 852 of the 1972 Tennessee Public Acts. The statute empowers The Department's Industrial Development Division to act with and/or on behalf of communities and business and industries throughout the state to assure their continuous economic and industrial growth. The department is concerned because of the adverse economic effect it believes abandonment would have on

the future of Hickman and Lewis Counties. It fears that a loss of rail service would result in a shutdown by MMF Wood Products, a division of Fibreboard Corporation, located in Centerville and Lewis Products (American Biltrite Corporation) in Hohenwald. A shutdown by these two companies could cause unemployment for some 600 workers or about 7 percent of the counties' total employment. In November 1975 the unemployment rate for this two county area was 8.9 percent or 1½ percent higher than the Tennessee average. Also, although no direct relationship can be shown at this time between other industries in the area and the rail line, the Department fears this abandonment would diminish economic and industrial growth potential in an already economically underdeveloped area. For these reasons it opposes the abandonment.

Lewis Products Company is the name used by the plant at Hohenwald entirely owned by American Biltrite Corporation. The plant manufactures fire hose, hydraulic hose and steam hose. It was acquired by American Biltrite in 1961 and at that time occupied 165,000 square feet and employed 314 people. It has increased considerably and at the present time covers 307,900 square feet, employs about 541 people and had a payroll in 1975 of $4.6 million as compared with $2,120,000 in 1966.

American Biltrite receives carbon black, synthetic rubber, limestone, clay, asphalt, Hi Sil and Silene D by rail. All of these shipments move over the Centerville Branch. American Biltrite moved carbon black from its supplier in Borger, Tex., to Hohenwald by motor carrier prior to 1972. In December, 1972, 10 months before this application was filed, American Biltrite requested information from the railroad on the status of the Centerville

Branch. It was informed by the L&N that it did study individual branch lines periodically and had studied the Centerville Branch and concluded that no attempt would be made to abandon it at that time. Based on this information, American Biltrite installed a bulk unloading facility and a new railroad spur at a cost to it of $268,211. American Biltrite's annual rail traffic increased from 7.2 million pounds in 1972 to 11.9 million pounds through December 12, 1975. It projects that it will receive some 13.2 million pounds in 1976 and 14 million pounds in 1977. It does not ship outbound by rail.

If the line is abandoned, American Biltrite expects that it will incur an additional annual transporation cost of $186,093 to receive its raw materials by truck. A breakdown by commodity would be as follows:

COST DIFFERENTIAL*

Product	Weight in lbs.	Rail Cost	Truck Cost
Clay	1,800,000	$ 13,914	$ 22,140
Asphalt	200,000	1,280	2,680
Hi-Sil	400,000	4,000	11,440
Silene D	400,000	4,000	9,040
Synthetic Rubber			
Baton Rouge	1,200,000	7,320	20,160
Baytown	1,200,000	10,400	23,400
Borger	1,200,000	9,120	25,200
Carbon Black	5,500,000	63,800	179,850
Limestone	2,100,000	7,423	13,440
		$121,257	$307,350

*Based on total shipments per year of 14,000,000 lbs.

There are not any motor carriers authorized to transport carbon black from the Borger, Texas origin. The figure is based on information supplied by Robertson Transportation Line at Houston, Texas.

American Biltrite is especially loath to change suppliers of carbon black. It has used the same supplier at Borger, Tex., J. M. Huber Corp., for over 20 years and would like to continue inasmuch as this supplier controls natural gas sources which are basic to the production of carbon black and has always been able to supply material even in times of shortage. Also, the use of a new supplier would force American Biltrite to reformulate its production since each supplier has different characteristics in the chemical analysis of its product. Carbon black is an essential ingredient being used in 80 percent of 230 compounds and it must be handled very carefully because of the possibility of contamination and pollution. American Biltrite does not believe it could go back to receiving carbon black by bag because of regulations promulgated since 1972 by the Occupational Safety and Health Administration and Environmental Protection Agency.

If the line is abandoned, this would be the only plant of American Biltrite not to have rail service. Because of the amount of raw material it uses, rail service was one of the prime considerations for locating the plant at Hohenwald. The company believes the cost of trucking plus the cost of formulation changes would make the Hohenwald plant non competitive and it believes the plant will close if the line is abandoned.[12]/ It is able to live with once a week service.

12/ The transcript is erroneous at page 149. See correction on page 9 of the Brief of American Biltrite Corp.

J. M. Huber Corporation is the major supplier of carbon black and clay to American Biltrite at Hohenwald. Carbon black originates at Huber's Borger, Texas facility and clay from its plant at Langley, S. C. Almost all of this material moves by rail. In 1975 Huber shipped more than 6,000,000 pounds of carbon black and 1½ million pounds of clay to Hohenwald. Carbon black is highly contaminating and very difficult to handle so that Huber ships a great deal of carbon black in specially designed rail hopper cars that it owns or leases. Customers prefer to receive bulk shipments because it is cheaper and easier to handle. The technical staff of J. M. Huber does not believe that it will be able to ship carbon black in bulk to the nearest railhead and then move it by truck to Hohenwald because the pellets, the form in which the carbon black is shipped, will breakdown and the material will become very difficult to handle. Huber has checked on truck rates from Borger, Tex., to Hohenwald, a distance of 963 miles and was told by a bulk carrier that the rate would be approximately $3.27 per hundred pounds based on a minimum of 45,000 pounds. The present rail rate is $1.16 per hundred pounds. Using truck rather than rail, the increased cost per ton to the receiver would be $42.20. The reason for the high rate is that equipment used to transport carbon black usually cannot be used for anything else so that in most cases it is a one way haul. Huber does not believe that it would absorb much of this increase where the product sells for $18 a ton. It fears losing this business which amounts to about $500,000 a year and the idling of its privately owned specialized rail cars which now earn some $66,000 a year in mileage allowances on this traffic.

Fibreboard Corporation with principal offices in San Francisco, Calif., is a manufacturer of paperboard,

packaging and forest products. The company's Forest Products Group operates a plant consisting of a sawmill and chipper at Centerville that was formerly operated by MMF Wood Products Company.[13]/ Fibreboard also operates hardwood sawmills at Pulaski and Fayetteville, Tenn. Fibreboard acquired the mill at Centerville for $1,000,000 in December, 1973. It was aware of the abandonment application when it made the purchase. Most of the lumber produced at Centerville is used as pallet stock. The sawmill can process approximately 10 million board feet of lumber per year and the chipper has a capacity of from 40 to 50,000 tons per year. Chips are being sold to Wescor at Hawesville, Ky., 195 miles away, and Celotex Corporation at Paris, Tenn., 107 miles away, and are being moved to these customers over the Centerville Branch. If it used trucks, Fibreboard expects that the additional cost would be $3.45 per ton to Hawesville[14]/ and $1.89 per ton to Paris, and an estimated $120,000 for storage bins to hold the chips until trucks are ready for loading. The cost of a loading facility at Colesburg, a point in the L&N's main line, plus trucks to move the chips there would be $300,000 not counting the expense of operating trucks the 75 mile round trip. It expects that if it became necessary to go to trucking to move its wood chips that it would have to go to private carriage or obtain the services of a contract carrier.

When Fibreboard acquired this plant, it had plans for expansion, however, because of the down turn in the

13/ The mill is at times said to be at Centerville (MP 32) at other times at Watson (M.P. 38). The traffic originates at Watson.

14/ These figures are from Fibreboard's brief, the transcript at page 203 shows as estimated increase of $5.42 per ton by truck over rail from Centerville to Hawsville.

economy it has not been possible to do so. The mill had 10 employees in January, 1976, if operating at capacity it would employ from 50 to 60 people. The sawmill only operated one month in 1975 and the last half of 1974. In this same time frame, the chipper was closed down for three months and only operated one shift the rest of the time. In 1970 MMF Wood Products shipped 968 cars, in 1971 514 cars, in 1972 386 cars and in 1973 885 cars. Fibreboard shipped 506 cars in 1974 and 377 cars in 1975.

Fibreboard contends that it has had consistent problems in acquiring adequate rail cars to satisfy its shipping needs.[15]/ It cites September, 1975, when it had material available for loading 107 cars and was only furnished 50 cars. In the third quarter of 1975 it had production available to ship 215 cars but was only furnished 157. In December, 1975, it ordered 33 cars and received 23 cars and in the months of January up through January 12, 1976, it had 22 cars on order and was furnished only 10.

Neither the Pulaski nor the Fayetteville mills have rail service immediately available. At Pulaski Fibreboard operates a dump truck to take wood chips to a railhead about 3 miles away where they are dumped into a chopper that feeds the rail car. Chips from Fayetteville are shipped by truck 96 miles to Stefson, Ala. Fibreboard uses three chip trailers that it owns for this move. In 1975 about 15,000 tons of chips moved from both of these plants. Considering the present market and prices for wood chips in the Tennessee area, Fibreboard expects

15/ Exhibit No. 21 compares cars pulled, placed and on hand at Watson in 1975. The L&N offered this to show that Fibreboard's claim that it did not receive sufficient cars was false.

that elimination of railroad service will result in its closing its facility at Centerville.

Celotex Corporation makes cardboard siding for the housing industry at its Paris, Tenn., mill. Celotex buys wood chips from Fibreboard at Centerville. It pays Fibreboard $14 a ton delivered Paris. It would only agree to pay more to receive chips in unusual circumstances. Outside of Fibreboard its furthest supply of wood chips is 65 miles away. These chips are trucked in. It sees an improvement in the market for wood chips by the summer of 1976 from the poor market that has existed for the last year or two. Prior to the recession it had 11 suppliers and received about 100 tons a week. It now uses seven suppliers and receives about 40 tons a week. It is aware of possible changes in wood consumption worldwide that could improve radically the area's marketing possibilities for wood chips.

Westcorp-Western Craft jointly own a plant at Hawesville, Ky., that produces paper for the manufacture of cardboard boxes. Over the past five years, Westcorp-Western Craft has purchased the following amounts of wood chips from Fibreboard at Centerville:

1970—	5,215	tons or	968	carloads
1971—	30,246	" "	514	"
1972—	18,254	" "	339	"
1973—	36,370	" "	742	"
1974—	16,602	" "	307	"
1975—	11,480	" "	219	"

It pays $11 a ton loaded on a rail car plus freight charges of approximately $4.47 a ton. About 35 of the company's

suppliers ship by rail, most of the others, 75 or so, use their own trucks to make delivery. If rail rates increase, it would look for another source of supply to replace the volume it is buying from Fibreboard. It sees an increasing demand for wood chips from the Hickman and Lewis County area. Western Craft has an active land acquisition program in the area and owns approximately 60,000 acres of timber land. Other companies such as Koppers are doing likewise.

The local chairman for the United Transportation Union testified that his organization had met with local representatives of the L&N in an attempt to modify the existing labor agreement governing employees on the Centerville Branch: The negotiations which took place in July to September, 1975, did not get anywhere because the L&N did not see benefit to it from the proposal. The Union's position is that appropriate protective conditions should be included in any order issued by the Commission authorizing the abandonment.

Mr. T. C. Carroll, County Judge, for Lewis County, Tenn., presented a resolution passed by the Quarterly County Court of Lewis County on January 12, 1976, protesting the abandonment of the Centerville Branch.

Mr. Dol Willis, Mayor of Hohenwald, Tenn., believes the loss of rail service will make it practically impossible for Hohenwald and the surrounding area to attract heavy industry. The Mayor fears that a shut down by Lewis Products (American Biltrite Corp.) would idle 20 percent of the area's work force. This city has received Federal funds for improvement of the sewer system in Hohenwald and has also applied for a $250,000

grant to be used to improve the industrial park of about 56 acres located on the railroad, just south of Lewis Products. Mayor Willis is aware of several companies which produce cross ties. They include Koppers and Moss American. Hohenwald also has a stave mill that makes barrel staves and these staves are shipped on the railroad.

Mr. Hunt McClanahan, County Judge of Hickman County, testified that the county has an industrial park about a quarter of a mile from the railroad line. The judge is of the opinion that the large timber and phosphate resources in the county are a valuable source of future rail traffic. He believes that abandonment of the rail line would stop heavy industry from moving into the county. He disagrees with the railroad witness who testified that the land along the branch is too hilly for industrial development. The city also has an industrial park for which it received a Federal grant in 1969 for utilities. This park is 200 yards from the railroad. It has one industry located in it now but this industry does not use the railroad. Both the county and the city industrial park are 60 acres each in size. The judge named several industries which have located in the county in the last several years. Some of these are Tennessee Gas and Transportation Company at Nunnelly, MMF Land Company, Rivers Manufacturing Company and McCaleb Lumber Company. They are located on the branch and he says they use the railroad.

ARGUMENTS IN BRIEFS

Applicant contends that operation of the Centerville Branch will result in a continuing and undue burden on it and on interstate commerce, which burden is not outweighed by the present or future public convenience

and necessity. It refers to the 12 cars per mile use of the Branch in 1975 and the regulations at 49 C.F.R. #1121.20-1121.24 to establish the presumption that the public convenience and necessity do not require the line's operation. It contends that protestants have failed to rebut the presumption. The evidence of future rail traffic is speculative. It questions the weight to be given the statement of American Biltrite that it will close operations if the line is abandoned and thinks the record shows that Fibreboard's mill at Watson might die a natural death regardless of the line's continuation. It defends the poor condition of the line citing *Missouri-Kansas-Texas R. Co. Abandonment, Oklahoma,* 338 I.C.C. 720 (1971) and points to two cases for the proposition that the Commission has allowed the abandonment of even marginally profitable lines upon a showing that extensive rehabilitation costs would not be recouped by the carrier within the forseeable future. Finally, it defends the level of service over the line as that required by traffic demands.

In a joint brief the United Transportation Union, the Tennessee Public Service Commission, the Department of Economic and Community Development of the State of Tennessee, the community of Hohenwald and Lewis County and the community of Centerville and Hickman County, contend that applicant was presumptuous in treating the line with only spot maintenance while the application was pending. They move to hold the proceeding in abeyance pending action or inaction by the State of Tennessee in connection with the Railroad Revitalization and Regulatory Reform Act of 1976, PL 94-210.

American Biltrite Corporation and J. M. Huber Corporation contend that the losses sustained on the

Centerville Branch of $20,045 in 1973 and $7,202 in 1974[16]/ are negligible when compared with the amount of railroad profits in those years. They think that railroad expenses could be reduced by once a week operations and negotiations with the unions. They see the $600,000 rehabilitation expense as window dressing since a witness admitted that if the application was denied the railroad would not do this level of maintenance. It sees the disadvantages to protestants as far outweighing the slight loss to applicant.

Fibreboard Corporation states that its operation is totally dependent on rail service over the Centerville Branch as there is no present alternative and the mill will close if the application is granted. It claims that the railroad has set the stage for this application by deliberate neglect of the line and that current revenue should not be compared with the cost of restoring the results of the railroad's past inactivity. It alleges that prolonged neglect and economic conditions have had a stunning effect on traffic and that another factor has been the L&N's failure to fill its car orders. It stresses the adverse impact abandonment would have on the entire area.

PRELIMINARY MATTERS

In its Supplemental Brief protestants Tennessee Public Service Commission, et al, moved to hold this proceeding in abeyance. This motion is denied. This application has already been pending over two years and the indefinite delay proposed would be unconscionable. The terms of the Railroad Revitalization and Regulatory

16/ This figure is $6,909 if you carry through the corrections made at Tr. page 328.

Reform Act of 1976 are clear and if the continuation of operations is as vital to the State of Tennessee as claimed on this record, there will be opportunity for the state to act to continue rail service.

DISCUSSION AND CONCLUSIONS

The Act states that no abandonment shall occur unless and until the Commission issues a certificate that the present or future public convenience and necessity permit such abandonment. To make this judgment it is necessary to weigh the arguments advanced pro and con.

The railroad's position is that the line loses money and there is no reasonable prospect that this will change. The railroad's $602,100 five year rehabilitation figure is of little weight since rail personnel admitted that they had no intention of spending that amount.[17]/ What is extremely relevant is that the line lost $20,045 in 1973, $6,909 in 1974 and $44,949 for the first nine months of 1975, based on the railroad's avoidable expense of $280,101 in 1973, $276,973 in 1974 and $163,492 for the first nine months of 1975. Protestants were not able to refute the railroad's position that these figures were compiled using accepted railroad accounting procedures and reflect the avoidable expenses of running this line.

We believe these figures are accurate. Grades of more than 2 percent and curves that exceed 15 degrees are sufficient to hinder rail operations. It only stands to reason then that a 50.5 mile line that has 16.54 miles of grades exceeding 2 percent, 14 curves of 15 degrees or more, 7 wooden trestles and 12 bridges will be expensive

17/ Tr. page 90.

to maintain and service. Conditions on this line are such that the average length of a train is 15 cars yet longer trains would require more power and it is not possible to add another locomotive because of the grades and curves.

It is not clear on this record whether service modifications would cut the line's losses. Witness Willinger said his cost calculations for 1973-1975 were based on triweekly service and that if service has been rendered once a week, the line would have broken even in 1974 and lost $41,000 for the first nine months of 1975.[18]/ However, L&N's Assistant Superintendent of the Nashville Division said the line had once a week service during August through September 7, 1975,[19]/ and at times it sounded as if he thought that it was cheaper to run triweekly service.[20]/ Protestants contend that it would of course be cheaper but give no specifics. Even if it would be cheaper, Fibreboard says it would not be satisfied with service once a week if the market for wood chips improves at all. To be profitable the line needs more traffic. More traffic would necessitate more than once a week service because of the limited number of cars that can be moved on each train. Altering service does not then seem to be of any solution.

Protestants contend that the lines losses are negligible compared with the railroad's overall profit. This argument is short sighted and self-serving and the Commission has rejected it consistently. *Southern Pacific Co.*

18/ Tr. pages 52 and 329.

19/ Compare Tr. page 301 and 303, at first witness said he cut service to once a week for economic reasons, then he says it might be cheaper to run the train three times a week.

20/ Tr. page 303.

Abandonment, 72 I.C.C. 404, 407 (1922), *Chesapeake & Ohio Railway Co. Abandonment*, 242 I.C.C. 622, 627-628 (1940) and *New York Central R.R. Co. Abandonment*, 254 I.C.C. 745, 761 (1944).

The only two shippers to testify in opposition are American Biltrite and Fibreboard. Fibreboard's traffic dropped in 1974 and 1975. It says it could not get the number of cars it needed, the railroad denies it, but Fibreboard does not say it would have had more rail traffic if it got more cars. In other words its car usage accurately reflects all its rail traffic. Fibreboard admits its rail usage is low and relies on projections of business upturns. This evidence of future need for wood chips is an unsubstantiated, hopeful prognostication and will not be accorded much weight. The Commission held in *Fort Dodge, Des Moines & Southern Railway Co. Abandonment* 312 I.C.C 708, 711 (1961) that:

> Although allegations of future increases in traffic are made, they appear largely speculative and no estimate as to the amount of such traffic, the revenue which might be derived therefrom, or the anticipated time when it will materialize, is made.

Moreover Fibreboard's claim that it cannot economically truck wood chips is softened by the admission that it does not have rail service adjoining its two other Tennessee hardwood mills and trucks wood chips 96 miles to a customer or 3 miles to the nearest rail head. If this line is abandoned, the nearest rail point would be about 38 miles away.

Rail transportation of bulk commodities such as Fibreboard's wood chips and the carbon black, clay and

chemicals of American Biltrite is undeniably cheaper for the person paying the freight charges. This economy is not however, a reason to force the railroad to continue a service on which it loses money. The judge is aware of the hardships that could very well occur, especially to American Biltrite and its 500 or so employees. Recent Federal legislation is designed to deal with these situations.

The Railroad Revitalization and Regulatory Reform Act, PL 94-210, enacted February 5, 1976, amends section 1 of the Interstate Commerce Act and also provides Federal assistance to states which decide to participate in rail freight assistance programs. Now when the Commission determines that the public convenience and necessity permit abandonment of a line of railroad it must publish this finding in the Federal Register. If within 30 days of publication, it finds that a financially responsible person (including a government entity) has offered financial assistance which will likely cover (A) the difference between the revenues attributable to the line and the avoidable cost of providing rail freight service, together with a reasonable return on the value of the line; or (B) the acquisition cost of all or a portion of the line, it must postpone the issuance of a certificate allowing abandonment for a maximum of 6 months to allow the parties time to reach an agreement and thus for the life of the agreement.

Inasmuch as the new statute is highly technical, affected parties might want to contact the Commission's Rail Services Planning Office, 1900 L Street, N.W., Washington, D. C. 20036 (Telephone 202-254-3281) for assistance. That office is charged with aiding states to decide whether to subsidize and for defining the terms that are used in the cost standards. Further details of

procedures under the new law are in the Commission's Notice served March 31, 1976. A copy of which is attached. Questions as to the procedures should be directed to the Commission's Section of Finance, Interstate Commerce Commission, 12th Street and Constitution Ave., N.W., Washington, D.C. 20423 (Telephone 202-275-7245).

As noted in footnote 2, the Tennessee Department of Conservation has indicated an interest in acquiring the right-of-way for recreational purposes. The L&N is agreeable to a condition which would give the Department 90 days after the railroad receives a certificate allowing abandonment to make an offer of purchase. (The Department might be interested in section 809 of the new law.) Such a condition will be included in my findings. There being no evidence as to the environment, I will accept the determinations made in the Commission's order served September 15, 1975.

One last argument to be treated is the blow abandonment will have on the area's industrial development. The evidence shows that only one company that uses the railroad has located on the line in 10 years. The other firms named by community spokesmen apparently move their traffic by other modes because they did not appear in opposition. This record is not convincing that the area's industrial growth will be damaged by the abandonment.

The railway labor unions have requested that if this line is authorized to be abandoned, the so-called *Burlington* conditions, as prescribed in *Chicago, B & Q R. Co. Abandonment*, 257 I.C.C. 700, be imposed for the benefit of employees who may be adversely affected by the abandonment. The *Burlington* conditions are

customarily imposed in abandonment proceedings and they are appropriate for this situation.

FINDINGS AND ORDER

Upon consideration of all the evidence of record, the Administrative Law Judge finds that the present and future public convenience and necessity permit the abandonment by the Louisville and Nashville Railroad Company of the line of railroad which turns out of the L&N's main line at Colesburg, Dickson County, Tenn., and extends from Mile Post 2 to just south of Mile Post 52 near Hohenwald, Lewis County, Tenn., a distance of about 50.5 miles. Provided: That the L&N made available to employees the protective conditions set forth in *Chicago, B & Q R. Co. Abandonment*, 257 I.C.C. 700 and that it hold the involved property under the tracks intact for 90 days following issuance to it of a certificate of public convenience and necessity permitting abandonment to allow for an offer of purchase by the Tennessee State Department of Conservation.

The Administrative Law Judge further finds that this is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, 42 U.S.C. 4332, et seq.

It is ordered, That any person or government entity considering an offer of financial assistance to enable the rail service involved to be continued, should give notice promptly that it is considering such an offer by certified mail to the L&N and by first class mail to all parties of record and the Commission;

It is further ordered, That the L&N shall, within 10 days after receiving such a notice, make available to the party considering the offer of financial assistance the information described under the heading "Railroads Seeking Abandonment Authority", in the attached Notice of the Commission entitled "Procedures for Pending Abandonment Cases", (Procedures) served and published in the Federal Register, 41 FR 13691, March 31, 1976, in the manner described in the Procedures;

It is further ordered, That upon this order becoming administratively final, notice of the finding of public convenience and necessity made herein shall be published in the Federal Register pursuant to the requirements of section 1a(6)(a) of the Interstate Commerce Act, as amended;

It is further ordered, That, notwithstanding any notice that financial assistance is being considered that may have been given pursuant to the above ordering paragraph, any person or government entity desiring to offer financial assistance to enable the rail service involved to be continued shall, within 15 days of publication in the Federal Register of the above-described finding of public convenience and necessity, and notification of such offer by certified mail to the L&N and the Commission and by first class mail to all parties of record, and such notification shall include the terms and information described under the heading, "Persons Offering Rail Service Assistance", which appears in the Procedures;

It is further ordered, That if the Commission finds that a financially responsible person has offered assistance in accordance with the Procedures, the Commission shall postpone the issuance of a certificate of abandonment for

such reasonable time, not to exceed 6 months, as is necessary to enable such person or government entity to enter into a binding agreement with the L&N to provide financial assistance for continued rail service or to purchase the rail line;

It is further ordered, That when the Commission is informed of the execution of any financial assistance agreement or acquisition and operating agreement, the issuance of the certificate of abandonment shall be postponed for such period of time as such an agreement (including any extensions or modifications) is in effect;

It is further ordered, That all correspondence to the Commission with respect to offers of financial assistance for the continued operations or acquisition of the subject line shall contain an appropriate reference to the subject proceeding; and that on the lower left-hand corner of envelopes containing such correspondence the following notation shall be typed in boldface "AB-RSCP";

It is further ordered, That subject to the conditions set forth above, an appropriate certificate of abandonment shall be issued, and the L&N shall not effect any abandonment or discontinuance of service prior to the effective date of such certificate of abandonment.

And it is further ordered, That this order shall be effective 20 days from the date of service in the absence of the filing of exceptions (appeal) or of a stay by the Commission.

Dated at Washington, D. C., this 17th day of May, 1976.

By the Commission, Brenda P. Murray, Administrative Law Judge.

ROBERT L. OSWALD,
Secretary

(SEAL)

(Service Date: March 31, 1976)

INTERSTATE COMMERCE COMMISSION
Washington, D.C.

NOTICE

PROCEDURES FOR
PENDING RAIL ABANDONMENT CASES

Information to interested persons concerning the implementation of section 1a(8) of the Interstate Commerce Act, as amended by the Railroad Revitalization and Regulatory Reform Act of 1976, Public Law 94-210, enacted on February 5, 1976, which relates to abandonment or discontinuance of operations proceedings filed prior to the promulgation of new regulations pertaining to such proceedings.

General

The purpose of this Notice is to provide information about the Interstate Commerce Commission's proposed means for handling pending railroad abandonment and discontinuance proceedings and the procedures it will follow in processing abandonment applications already on file or filed before final regulations are effective. "Abandonment" means the elimination of a rail line and includes a discontinuance of operations. "Discontinuance" means only the cessation of operations over the line. The term "abandonment" is used in this notice to embrace both situations.

Changes in the Commission's abandonment procedures were made necessary by the enactment, on February 5, 1976, of the Railroad Revitalization and Regulatory Reform Act of 1976 (Public Law 94-210). The need to process some 200 pending rail abandonment applications makes it imperative that these procedures be instituted as soon as possible, and precludes the opportunity for public comment at this time.

The procedures described in this Notice are of an interim nature and will apply, effective upon the date of their publication, to all cases in which the Commission authorizes the abandonment of a line of railroad pursuant to an application currently on file with it or filed before final regulations are effective. The Commission will soon issue a notice of proposed rulemaking looking toward the issuance of permanent regulations to govern subsequently filed abandonment applications. The procedures set forth in this Notice may be modified in view of the results of that proceeding.

New Abandonment Provisions

The procedures described in this Notice implement new paragraphs 1a(6) and (7) of the Interstate Commerce Act. Those paragraphs contain new provisions under which—

1. The Commission must provide public notice, through Federal Register publication, of each instance in which it finds that the public convenience and necessity would permit a railroad to abandon trackage or discontinue service.

2. Persons, including government entities, wishing

to preserve rail freight service set for discontinuance or abandonment may offer to purchase the line for continued operation or provide financial assistance to the railroad in the form of a "rail service continuation payment" (which may be conveniently termed an operating subsidy). In the words of new paragraph 1a(6) of the Interstate Commerce Act, the financial assistance must "(A) cover the difference between the revenues which are attributable to such line of railroad and the avoidable cost of providing rail freight service on such line, together with a reasonable return on the value of such line; or (B) cover the acquisition cost of all or any portion of such line of railroad."

3. If, within 30 days after publishing its finding that a proposed abandonment should be authorized, the Commission finds that a "financially responsible" person has made an offer likely to cover the losses on the line plus a reasonable profit, or to cover the cost of acquisition of all or any portion of such line, it must postpone the issuance of the certificate of abandonment (thus, in effect, requiring that service continue) for a period up to 6 months while negotiations for financial support take place. By the end of that 6 month period a binding agreement must be executed by the railroad and the offeror or a certificate authorizing the requested abandonment will be issued.

4. The applicant railroad is required to make available promptly to any person considering an offer of financial assistance its latest information about the physical condition of the line and data sufficient to permit computation of the amount of subsidy needed to justify continued operation.

5. Whenever an offer of financial assistance is made, the Commission must determine the amount by which the avoidable costs attributable to the line, plus a reasonable return on the value of the rail properties involved, exceed the revenues attributable to the line, thus providing assistance to any offeror of a subsidy in determining the amount that would have to be paid. The Standards for Determining Rail Service Continuation subsidies, 49 C.F.R. § 1125, adopted by the Commission's Rail Services Planning Office for the development of estimated subsidy payments under the Regional Rail Reorganization Act of 1973, shall be used in developing estimated payments under these new provisions.

6. The Commission must postpone the issuance of the certificate of abandonment for the period that any assistance or acquisition and operating agreement remains in effect.

The Local Rail Service Assistance Program

The new abandonment provisions of the Interstate Commerce Act are related to other provisions of Public Law 94-210. Section 803 of that act establishes a nationwide local rail services assistance program, to be administered by the United States Department of Transportation, under which the Federal government may reimburse the States for all or a portion of the funds expended by them in preserving or improving local rail freight service. The program becomes effective July 1, 1976, and extends through June 30, 1981. To be eligible for Federal aid, a State must develop a State rail services plan acceptable to the Secretary of Transportation, and comply with certain other statutory requirements and with regulations to be issued by the Secretary.

In deciding how to implement the new abandonment provisions of the Interstate Commerce Act, the Commission has considered the local rail service assistance program. While recognizing that the States will need some time to prepare to take advantage of this program, the Commission has determined that there is no need to delay the processing pending rail abandonment cases. Relatively few of them are in the final stages where an "administratively final" Commission order is imminent. An order of the Commission's employee boards, commonly called review boards, becomes administratively final upon the failure of any party to seek reconsideration of a board's decision. The initial decision of an Administrative Law Judge becomes administratively final if exceptions are not filed, unless the decision is stayed by the Commission. In most instances, a decision of the Commission or a division of the Commission becomes administratively final on the date on which it is served.

While it is our intention to process pending abandonment cases to their conclusion, any finding that an abandonment should be authorized will be made subject to conditions to assure that any State or individual considering making an offer of financial assistance will be given time to pursue that end, in accordance with the time limits discussed below. It would facilitate the processing of these cases, and enable the Commission to better deal with rail assistance proposals if persons interested in making such proposals could make that fact known as early as possible in each abandonment proceeding. Any party considering the making of an offer of financial assistance may do so at any time during the pendency of the abandonment proceeding. Notice of the intention to offer financial assistance must be in written form, with appropriate reference to the proceeding in-

volved, and must be served by certified mail upon the carrier seeking abandonment and first class mail upon all parties of record and the Commission.

It should be emphasized that submission of the notice of intent to offer financial assistance will not be used as an element supporting a decision authorizing an abandonment. The purpose of the notice is to provide persons with the information necessary to decide whether to offer financial assistance; to afford the railroads an opportunity to provide the required information; and to facilitate the Commission's action on the offer.

The Commission's Abandonment Procedure

In finding that any abandonment of rail freight service should be authorized, the Commission will impose conditions giving full effect to the provisions of the new law providing for the retention of service through rail service assistance payments. No certificate authorizing an abandonment will be issued until the finding that the abandonment should be authorized is served upon all parties and the governor of each State in which the trackage is located, and is published by notice in the Federal Register.

Issuance of the certificate of abandonment will be postponed for up to 6 months if, within 15 days of the publication of the Federal Register notice, the Commission receives notice that an offer of financial assistance has been made by a person shown to be financially responsible and determines that the offer is likely to cover the cost of acquiring all or part of the line or the losses incurred in operating the line plus a reasonable return on the value of the line.

The Commission will adopt the same conceptual approach developed by the Rail Services Planning Office in connection with the regional subsidy program authorized by the Regional Rail Reorganization Act of 1973 for the purposes of estimating the subsidy payment. It is recognized that there are statutory differences in the two programs. These differences relate primarily to the exclusion of a management fee in the national program, the inclusion of certain additional costs as set forth in section 1a(11) of the Interstate Commerce Act, and the basis upon which a reasonable return is to be calculated. The Commission will take these differences into consideration in establishing the subsidy payment. The Rail Services Planning Office, whose address appears at the end of this notice, will provide copies of the standards as well as technical assistance to the railroads and to potential subsidizers in developing the estimates.

For the Commission to postpone the issuance of a certificate for a period not to exceed 6 months, to allow an offeror and the railroad to enter into a binding agreement for financial assistance, the notification to the Commission of an offer must include information sufficient to support the statutory finding that the assistance offered is likely to cover the difference between the revenues attributable to the line of railroad and the avoidable cost of providing freight service over that line plus a reasonable return on the value of that line, or that it is likely to cover the acquisition cost of all or a portion of the line. The Commission is required by section 1a(6)(a)(ii) to make such a finding before postponing the issuance of a certificate.

When the Commission by order postpones issuance of a certificate for up to 6 months, the railroad and

the offeror have that period to execute an assistance or acquisition and operating agreement. Upon notification that such a finding agreement has been executed, the Commission shall further postpone the issuance of a certificate for the period such an agreement is in effect, including extensions. The Commission's abandonment order will provide that issuance of a certificate of abandonment will be postponed if the railroad and the person offering assistance enter into a binding agreement for continued operations and that the postponement will be for the period of the agreement.

Such an agreement may be based on any form of financial assistance acceptable to the railroad and the person offering financial assistance. From time to time in abandonment proceedings before the Commission, railroads allege that the cost of rehabilitation necessary for efficient operation is so high that continued operations are economically infeasible. Therefore, instances may arise in which a railroad will accept an offer to finance rehabilitation of a line and will enter into a financial assistance agreement providing for continued operations on that basis. For example, a State or other interested person might rehabilitate the line, and the railroad, relieved of the rehabilitation cost, may then be able to operate the line at a profit. As previously noted rehabilitation costs paid for by a State may be eligible for reimbursement by the Federal Government.

If a binding agreement is not reached because of the railroad's refusal to accept an offer which the Commission finds sufficient to satisfy the statutory requirements for continued operation under subsidy, the abandonment proceeding may be reopened within the 6 month postponement period so that the Commission, on

the basis of the new facts, may reconsider the question of whether the abandonment should be authorized.

A further condition will be imposed that requires the railroad to make available its most recent reports on the physical condition of the line, and information making it possible to compute an adequate rail services continuation payment, to any person notifying the railroad that he is considering making an offer of financial assistance requiring such information.

The certificate issued by the Commission in an abandonment proceeding will be made subject to such conditions as may be required by the public convenience and necessity, and shall include provisions for the protection of the interests of railroad employees.

Persons Offering Rail Service Assistance

Because of statutory time limits imposed upon the Commission, anyone making an offer of financial or other assistance in order to provide for the continuation of rail freight service that would otherwise be abandoned, should make certain that the Commission receives notice of such offer within 15 days of the publication in the Federal Register of notice of the finding that the abandonment should be authorized. That notification should include:

1. A copy of a firm offer to provide assistance, stating clearly the amount of money or other consideration offered and any terms or conditions to the offer. The offeror should certify that the offer has been made to the railroad.

2. Information demonstrating the financial responsibility of the person making the offer. The offeror should submit evidence demonstrating that it has, or will have at the time the proposed agreement is to be executed, appropriate authority, and the necessary funds, to enter into and fulfill contracts of the kind contemplated. If the offeror is not a government entity, the information demonstrating financial responsibility must include, but need not be limited to:

(a) A balance sheeting showing its financial condition as of the latest available date but no more than 6 months prior to the date of the notification to the Commission, and

(b) An income statement showing its revenues, expenses, and net income for the current calendar year to the latest available date and for each of the two preceding calendar years.

3. Information sufficient to support a finding by the Commission that the assistance being offered is likely to cover the differences between the revenues attributable to the line of railroad and the avoidable costs of providing rail freight service over the line, plus a reasonable return on the value of the line; or that it is likely to cover the cost of acquiring all or a portion of the line.

Railroads Seeking Abandonment Authority

A railroad which is an applicant for authority to abandon a line of railroad or a rail service shall be required to make available to any person informing it that it is considering offering financial assistance and requesting such information, within 10 days of receiving such

notification whether such notification is received before or after the publication in the Federal Register:

1. Its most recent reports on the physical condition of the line of railroad which is the subject of application.

2. A current report on the train service on the line and a current report on the traffic and revenue attributable to the line.

3. An actual computation of the extent to which the avoidable cost of providing rail freight service on such line of railroad, plus a reasonable return on the value of the rail properties involved, exceed the revenues attributable to such line of railroad, as determined by the Standards for Determining Rail Service Continuation Subsidies, 49 C.F.R. § 1125.

The information described above shall either be furnished to the offeror of financial assistance or be made available for examination, during regular working hours, at a location within each State within which is located the line of railroad which is the subject of the abandonment application or some other location acceptable to the offeror. Information concerning the nature, the kind, quantity, destination, consignee, or routing of traffic shall, in the railroad's discretion, be made available to the offeror, provided all affected parties consent or disclosure is otherwise made in accordance with section 15(11) of the Interstate Commerce Act, 49 U.S.C. § 15(11).

Compliance with Time Limits

In view of the statutory requirements imposed

upon the Commission, all parties, both offerors of financial assistance and railroads seeking certificates for abandonment or discontinuance of lines of railroad, will be required to adhere strictly to the time limits set forth in this Notice. Failure to do so could prevent the Commission from making its required findings within the 30 day statutory period, and may result in an adverse decision to the party in default.

Rail carriers which have pending applications seeking authority to abandon or discontinue lines of railroad should consider, at least in proceedings under protest, supplementing their application with the material necessary for parties to determine the possible requirements for rail service continuation payments on acquisition of the line in order to continue rail service. Persons considering making an offer of a rail continuation payment, in order to provide for continued service over a line for which a certificate for abandonment or discontinuance is being sought, should indicate their intention without delay—if possible, prior to the publication in the Federal Register of the Commission's findings.

In order to expedite the handling of submissions to the Commission, envelopes mailed to the Commission either by carriers or offerors should have the initials AB-RSCP printed in the lower left hand corner, and the docket number of the proceeding, if known.

Further Information

Persons wishing information about the status of a particular abandonment proceeding or about the filing of pleadings, requests for leave to intervene, and similar procedure matters should contact the Section of Finance,

Interstate Commerce Commission, 12th Street and Constitution Avenue, N.W., Washington, D.C. 20423 (telephone: 202-275-7245).

Persons desiring information about the rail freight services assistance program or about the computation of assistance payments should contact the Rail Services Planning Office, Interstate Commerce Commission, 1900 L Street, N.W., Washington, D.C. 20036 (telephone: 202-254-3281).

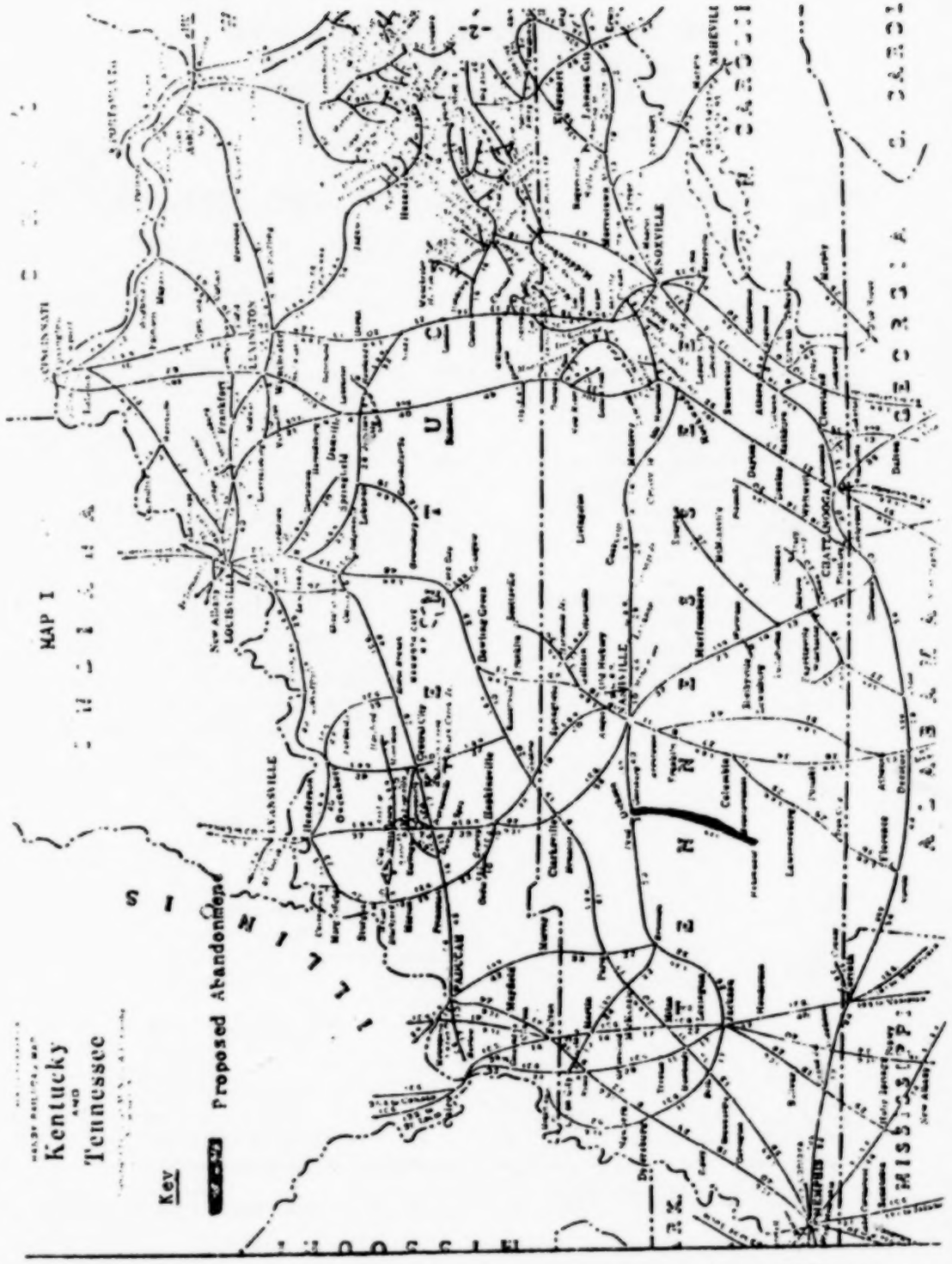
By the Commission.

Dated March 24, 1976.

ROBERT L. OSWALD,
Secretary

(SEAL)

APPENDIX A



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APPENDIX B

FREIGHT HANDLED TO AND FROM POINTS ON THE CENTERVILLE BRANCH AND POINTS BEYOND ORIGINATED OR TERMINATED TRAFFIC (NOTE A)

STCC NUMBER	DESCRIPTION	1973 CARS	1973 TONS	1974 CARS	1974 TONS	JAN.-SEPT.* 1975 CARS	JAN.-SEPT.* 1975 TONS
01	Farm Products	3	276	–	–	–	–
08	Forest Products	5	192	3	107	2	60
11	Coal	7	478	3	208	–	–
14	Non-Metallic Minerals	5	291	–	–	5	400
20	Food or Kindred Products	2	65	3	108	–	–
22	Textile Mill Products	2	15	–	–	1	15
24	Lumber or Wood Products	1,097	54,497	739	38,745	295	13,510
25	Furniture or Fixtures	1	60	–	–	–	–
26	Pulp, Paper or Allied Products	1	45	–	–	–	–
28	Chemicals or Allied Products	69	4,246	88	5,795	63	3,890
29	Petroleum or Coal Products	20	370	9	188	5	151
30	Rubber or Misc. Plastic Products	–	–	1	10	2	44
32	Clay, Concrete, Glass or Stone	59	2,713	58	2,451	37	1,616
33	Primary Metal Products	25	1,222	8	545	3	101
34	Fabricated Mill Products	5	92	6	151	–	–
35	Machinery	1	10	–	–	–	–
36	Electrical Machinery or Equipment	1	74	1	11	1	9
40	Waste or Scrap Material	3	79	2	38	3	60
41	Misc. Freight Shipments	–	–	2	55	–	–
46	Misc. Mixed Shipments	2	125	21	1,018	–	–
	TOTAL	1,308	64,850	944	49,339	417	19,856

(NOTE A) - There were no less than carload shipments for any of above periods.

* Total traffic for 1975 was 580 CL.

APPENDIX C

LOUISVILLE AND NASHVILLE RAILROAD COMPANY CENTERVILLE, TENNESSEE BRANCH AVOIDABLE EXPENSES BY I.C.C. ACCOUNTS FOR THE YEARS 1973, 1974 AND THE PERIOD JANUARY THROUGH SEPTEMBER, 1975

ICC ACCOUNT NUMBER	EXPENSE DESCRIPTION	1973	1974	JAN.-SEPT. 1975
	MAINTENANCE OF WAY AND STRUCTURES			
202	Roadway Maintenance	$ 2,421	$ 2,693	$ 446
208	Bridges, Trestles and Culverts	3,483	7,847	546
212	Ties	7,257	2,183	–
214	Rails	109	148	–
216	Other Track Material	595	550	–
218	Ballast	160	–	–
220	Track Laying and Surfacing	11,214	4,439	9,437
227	Station and Office Buildings	165	–	–
229	Roadway Buildings	–	286	95
266	Road Property Depreciation	4,062	4,062	3,047
273	Public Improvements, Maintenance	787	–	–
277	Employees' Health & Welfare Benefits	906	725	716
	Total Maintenance of Way & Structures	$ 31,159	$ 22,933	$ 14,287
	MAINTENANCE OF EQUIPMENT			
311	Locomotive Repairs	$ 6,906	$ 6,491	$ 4,463
314	Freight Train Car Repairs	11,799	7,822	4,756
331	Equipment - Depreciation	17,396	12,453	8,602
335	Employees' Health & Welfare Benefits	558	391	252
	Total Maintenance of Equipment	$ 36,659	$ 27,157	$ 18,073
	TRANSPORTATION			
373	Station Employees	$ 1,702	$ 1,656	$ 1,061
376	Station Supplies	215	213	208
392	Train Enginemen	18,396	17,973	14,983
394	Train Fuel	5,685	10,925	7,514
400	Servicing Train Locomotives	1,374	1,368	941
401	Trainmen	36,168	33,913	24,714
402	Train Supplies and Expenses	339	134	152
404	Signals and Interlockers	71	92	54
409	Employees' Health & Welfare Benefits	3,196	2,952	2,244
	Total Transportation	$ 67,146	$ 69,226	$ 51,871
	INCOME ACCOUNTS - DEBIT			
532	Railway Tax Accruals			
	(a) Payroll Taxes	$ 9,611	$ 11,377	$ 8,893
	(b) Ad Valorem Taxes	18,927	21,060	15,795
536	Hire of Freight Cars	3,818	6,036	3,082
	Total Income Accounts - Debit	$ 32,356	$ 38,473	$ 27,770
	Total Avoidable Expenses on Branch	$167,320	$157,789	$112,001

APPENDIX D

LOUISVILLE AND NASHVILLE RAILROAD COMPANY
EFFECT ON NET RAILWAY OPERATING INCOME
UPON ABANDONMENT OF CENTERVILLE BRANCH
FOR THE YEARS 1973, 1974 AND THE PERIOD
JANUARY THROUGH SEPTEMBER, 1975

	1973	1974	JAN.-SEPT. 1975
L&N Gross Revenue Earned from Traffic to or from Points on the Line Proposed to be Abandoned and also Handled on other Portions of the L&N System			
I.C.C. Account 101 - Freight	$258,666	$269,934	$118,374
I.C.C. Account 137 - Demurrage	1,390	130	170
Total System Revenue	$260,056	$270,064	$118,544
L&N Gross Revenue Assignable to the Centreville Branch			
I.C.C. Account 101 - Freight	$ 33,104	$ 31,566	$ 15,390
I.C.C. Account 137 - Demurrage	1,390	130	170
Total Revenue Assignable to Branch	$ 34,494	$ 31,696	$ 15,560
L&N Gross Revenue Assignable to other Portions of the L&N System			
I.C.C. Account 101 - Freight	$225,562	$238,368	$102,984
Avoidable Expenses on Branch			
Maintenance oy Way and Structures	$ 31,159	$ 22,933	$ 14,287
Maintenance of Equipment	36,659	27,157	18,073
Transportation	67,146	69,226	51,871
Income Accounts - Debit	32,356	38,473	27,770
Total Avoidable Expenses on Branch	$167,320	$157,789	$112,001
Net Profit or (Loss) from Operating Branch Line	($132,826)	($126,386)	($ 96,727)
Net Profit when using 50% of I.C.C. on L&N Gross Revenue Assignable to other Portions of the L&N System			
I.C.C. Account 101 - Freight	$112,781	$119,184	$ 51,492
Net Profit or (Loss) to System	($ 20,045)	($ 6,909)	($ 44,949)
Net Effect on Operating Income upon Abandonment	$ 20,045	$ 6,909	$ 44,949

APPENDIX B

(Service Date: November 29, 1976)

DECISION AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D.C., on the 18th day of November, 1976.

Docket No. AB-2 (Sub-No. 5)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY--ABANDONMENT BETWEEN COLESBURG AND HOHENWALD IN DICKSON, HICKMAN AND LEWIS COUNTIES, TENNESSEE

Upon consideration of the application and the record in the above-entitled proceeding, including the initial decision and recommended order of the Administrative Law Judge, the exceptions filed jointly by American Biltrite, Inc., J. M. Huber Corporation and Fibreboard Corporation and jointly by Tennessee Public Service Commission, United Transportation Union, Department of Economic and Community Development, Hickman and Lewis Counties and the Cities of Hohenwald and Centerville, Tenn., and the reply thereto of the Louisville and Nashville Railroad Company; and

It appearing, That the Administrative Law Judge recommended that the application in the above-entitled proceeding be granted;

It further appearing, That the findings and conclusions of the Administrative Law Judge, with respect to all mat-

ters of fact and law disposed of in her report, are in all material respects proper and correct; that the pleadings present no new or material matters of fact or law not adequately considered and properly disposed of by the Administrative Law Judge in her report, and are not of such a nature as to require the issuance of a report discussing the evidence in the light of the pleadings;

It further appearing, That this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969:

Wherefore, and good cause appearing therefore:

We find, That the evidence considered in the light of the pleadings does not warrant a result different from that reached by the Administrative Law Judge, and that the statement of facts, the conclusions, and the findings of the Administrative Law Judge, in her report, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

It is ordered, That subject to the same conditions for protection of employees as set forth in *Chicago B&Q R. Co. Abandonment,* 257 I.C.C. 700, the present and future public convenience and necessity permit abandonment by the Louisville & Nashville Railroad Company (L&N) of the line of railroad which turns out of the L&N's main line at Colesburg, Dickson County, Tenn., and extends from milepost 2 to just south of milepost 52 near Hohenwald, Lewis County, Tenn.; *provided, however,* that any responsible state agency and/or local government or other interest responsible organization be given the opportunity for a period of 90 days from the date of issuance of a cer-

tificate of public convenience and necessity permitting abandonment to negotiate the purchase of all or any portion of the right-of-way of the line to be abandoned for public use at a purchase price on such terms as the parties may agree as just and reasonable, and that L&N shall hold the involved property under the tracks intact for this period of time;

It is further ordered, That subject to the conditions set forth in the initial decision for the provision of financial assistance for continued operations or acquisition of the subject line, an appropriate certificate of abandonment shall be issued, and the applicant shall not effect any abandonment or discontinuance of service prior to the effective date of such certificate of abandonment;

It is further ordered, That this order be effective 35 days from the date of service hereof.

By the Commission, Division 3, Commissioners Brown, MacFarland and Clapp.

ROBERT L. OSWALD
Secretary

(SEAL)

APPENDIX C

(Filed June 27, 1977)

NO. 76-2651

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL.

Petitioners

and

AMERICAN BILTRITE, INC., Intervening Petitioner

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

Respondents

and

LOUISVILLE and NASHVILLE RAILROAD COMPANY

Intervening Respondent

Before: WEICK and PECK, Circuit Judges, and FREEMAN*, Senior District Judge.

This matter is before the Court under a petition to re-

*Honorable Ralph M. Freeman, United States District Court for the Eastern District of Michigan, sitting by designation.

view an order of the Interstate Commerce Commission which found that the present and future public convenience and necessity permit abondonment of service by the intervenor Louisville and Nashville Railroad Company between Colesburg and Hohenwald in Dickson, Hickman and Lewis Counties, Tennessee, and has been submitted on the briefs and oral arguments of counsel for the petitioners, respondents and intervenors. In this regard, notation is made of the fact that Willamette Industries, Inc. filed a motion for leave to intervene on June 9, 1977, and a memorandum in opposition to said motion was filed by the Interstate Commerce Commission June 13, 1977; in view of the fact that the matter was set for hearing on the merits on June 16, 1977, and was heard on that date, said motion is denied as untimely. Being fully advised in the premises, the Court concludes that the Interstate Commerce Commission's decision to grant the abandonment application is rational and supported by substantial evidence. Therefore,

IT IS ORDERED that the order of the Interstate Commerce Commission here under review be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
John P. Hehman, Clerk of Court

APPENDIX D

(Filed July 26, 1977)

NO. 76-2651

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL.

Petitioners

and

AMERICAN BILTRITE, INC., Intervening Petitioner

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION

Respondents

and

LOUISVILLE and NASHVILLE RAILROAD COMPANY

Intervening Respondent

ORDER

Before: WEICK and PECK, Circuit Judges, and FREEMAN*, Senior District Judge.

This matter having been submitted under the petitioners' petition for rehearing, and it having been concluded

that said petition is not well taken,

IT IS ORDERED that the Petition for Rehearing be and it is hereby is denied, with the observation that in entering its order of June 27, 1977, the Court was guided by the statutory presumptions and requirements of the Railroad Revitalization and Regulatory Reform Act, 45 U.S.C. § 801, et seq.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
John P. Hehman, Clerk of Court

APPENDIX E

(Service Date October 27, 1977)

INTERSTATE COMMERCE COMMISSION

CERTIFICATE AND ORDER

Docket No. AB-2 (Sub-No. 5)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY ABANDONMENT BETWEEN COLESBURG AND HOHENWALD, IN DICKSON, HICKMAN COUNTIES, TENNESSEE

I have considered the record in this proceeding, including the administratively final order served November 29, 1976, in which the Commission, Division 3, affirmed and adopted the findings of the Administrative Law Judge served May 27, 1976, authorizing the abandonment by the Louisville and Nashville Railroad Company of the line of railroad which turns out of the Louisville and Nashville's main line at Colesburg, Dickson County, Tennessee, and extends from milepost 2 to just south of milepost 52 near Hohenwald, Lewis County, Tennessee, a distance of about 50.0 miles, subject to the imposition of conditions for the protection of railway employees prescribed in *Chicago, B. & Q. R. Co., Abandonment*, 257 I.C.C. 700 (1944). The order served May 27, 1976, provided that any person, including a government entity, would be given the opportunity to make an offer of financial assistance to the carrier applicant, within 15 days of the date of publication of the Commission's findings in the Federal Register, by filing with the Commission an offer containing the evidence specified in *Procedures for*

Pending Rail Abandonment Cases, 41 Fed. Reg. 13691 (1976).

The notice of findings was published in the Federal Register on January 21, 1977. The time for the filing of offers of financial assistance has expired without a bona fide offer. In the absence of such an offer, an appropriate certificate and order should be entered.

Since the date of service of the prior order in this proceeding, Division 3 has enunciated new employee protective conditions to be imposed in abandonment proceedings filed prior to November 1, 1976 [See *Oregon Short Line R. Co. --Abandonment-- Goshen*, 354 I.C.C. 76, 87 (1977)]. To maintain consistency in Commission decisions, the prior order will be modified accordingly to impose the conditions for the protection of employees enacted in and developed pursuant to Section 405 of the Rail Passenger Service Act (45 U.S.C. 565).

It is certified that the present and future public convenience and necessity permit abandonment of the above-described line, subject to the conditions for the protection of railway employees specified above, and subject to the condition that any responsible State agency and/or local government or other interested organization be given the opportunity, for a period of 120 days from the service date of this certificate and order to negotiate the purchase of all or any portion of the rail properties of the line to be abandoned for public use at a price and on such terms as the parties may agree are just and reasonable.

It is ordered:

(1) This certificate and order shall take effect and be

in force on the date it is served. Tariffs applicable to the line herein permitted to be abandoned may be canceled upon not less than 10 days' notice to this Commission and to the general public by filing and posting in the manner prescribed by the Commission under Section 6 of the Interstate Commerce Act. When filing schedules cancelling tariffs applicable to said line, the applicant shall, in such schedules, refer to this certificate and order by date and docket number.

(2) If the authority granted by this certificate and order is exercised, applicant shall submit two copies of the journal entries showing the retirement of the line from service, and shall advise this Commission in writing, immediately after abandonment of the line of railroad, of the date on which the abandonment actually took place.

(3) If the authority granted in this certificate and order is not exercised within one year from its effective date, it shall be of no further force and effect.

Decided October 20, 1977.

By the Commission, Commission Brown.

H. G. HOMME, JR.
Acting Secretary.

(SEAL)

APPENDIX F

(Letterhead of Pittman, Clay, Morgan, etc.)

February 3, 1977

Ms. Wandaleen Poynter
Mr. Fred R. Birkholz
Law Department
Louisville & Nashville Railroad Co.
908 West Broadway
Louisville, Kentucky, Kentucky 40201

Re: Offer to negotiate subsidy with L & N Railroad on 50 mile segment of track between Colesburg and Hohenwald in Dickson, Hickman and Lewis Counties, Tennessee, ICC Docket AB-2 Sub 5

Dear Ms. Poynter and Mr. Birkholz:

Please consider this communication as a firm offer to provide assistance to the Louisville & Nashville Railroad Company on that segment of its rail lines which it seeks to abandon operating between Colesburg and Hohenwald located in Dickson, Hickman and Lewis Counties, Tennessee which matter is presently pending before the Interstate Commerce Commission in docket AB-2 Sub 5 and commonly known as the Centerville Branch. This communication is intended to comply with the criteria of the Commission for the continuation of rail freight service that might otherwise be abandoned, noting that the publication in the Federal Register on this abandonment ap-

peared on January 21, 1977 and is being dispatched to you before the completion of fifteen days of said publition.

As you know I represent American Biltrite, Inc. of Cambridge, Massachusetts who operates a manufacturing facility located on a rail siding of the Centerville Branch at Hohenwald, Tennessee and who has relied upon rail service for its many years of activity. This plant is sometimes referred to as Lewis Products Company. As you also know we have been engaging in considerable discussions, have had at least one formal meeting and are trying to set up another one with you to explore any and all alternatives of solving the problem of how American Biltrite, Inc. can hopefully continue to operate its plant in Hohenwald, Tennessee. At this juncture, since we have not arrived at any agreement or understanding as to how this might otherwise be accomplished considering numerous other alternatives, we feel compelled to explore and seriously negotiate with you about the possibility of providing regular assistance which might also be called a subsidy in order to keep the rail service available to us as needed by our plant for its continuing operation.

It is my understanding that in making this offer to you, we must demonstrate our financial responsibility submitting evidence that we are financially able to fulfill any contract entered into between my client and the railroad for this purpose. Accordingly, I enclose herewith a copy of the Annual Report of American Biltrite, Inc. for the year 1975 which contains all of the necessary financial data for the two years 1975 and 1974 which are audited statements from the auditing firm of Ernst & Ernst of Boston, Massachusetts. American Biltrite, Inc. is a publicly

owned corporation having over two and one-half million common shares outstanding with net sales for the year 1975 in excess of $173,000,000, a very strong asset to liability ratio and are in a strong financial position as more fully disclosed therein. Also, I enclose herewith a Report for the third quarter of the year 1976 which shows not only third quarter results but the first nine months of 1976 and as it compares to the same period of time in the year 1975. Said report was issued on November 2, 1976 which is within less than six months previous.

American Biltrite, Inc. states unequivocably that if as a result of the negotiations we propose to enter into hereinafter its net out of pocket expense by providing a subsidy is less than what it would otherwise be forced to pay to transport its products to its plant as Hohenwald than any other method of transportation either by truck altogether or a combination of rail and truck, whichever is the cheapest, then it stands ready willing and able to enter into a firm contract with the L & N Railroad to provide such a subsidy either in the form of a rate increase, a guarantee of a stipulated sum of traffic at a specified rate, or direct payments or a combination of any of these as may be mutually agreed upon by the parties. Said amount of subsidy shall be determined by the rules and regulations submitted by the Interstate Commerce Commission under its Standards for Determining Rail Service Continuation Subsidies and as such shall be an amount to cover the difference between the revenues attributable to this line of railroad and the avoidable cost of providing rail service over the line, plus a reasonable return on the value of the line. The amount is discussed hereafter.

I might further state that in considering this matter and in discussing such negotiations American Biltrite, Inc. can

accommodate itself to once per week service and that at this moment I can see no reason to consider maintaining the line at anything other than a Class I from a service standpoint. It is also my understanding that the cities and counties affected by this branch of the line, as well as, the State of Tennessee are desirous of and will cooperate toward maintaining the rail service on the Centerville Branch and that we can look to them for governmental help in reducing the tax burden on this segment of the line, as well as, applying for federal funds for rehabilitation, maintenance and operation of the branch.

To give you some idea as to why we think this offer may prove feasible, we have made many cost studies in recent months and as we have reported to you, if we were forced to utilize the next nearest railhead for the receipt of our inbound carbon black, we would be required to add an additional 500 foot siding to our plant at Lawrenceburg, Tennessee and there install equipment to handle the transfer of carbon black from rail cars to motor truck tank trailers which rail siding, switches and equipment necessary to effectuate the transfer would cost us $105,900. In addition, the best that we can calculate it would cost us an additional $70,000 per year for the purchase, maintenance and operation of the various motor trucks, tank trailers, personnel and manpower to operate the transfer facility and thereafter transport the carbon black to our plant at Hohenwald. As you are well aware we receive other inbound commodities by rail, not limited to carbon black which only amounts to approximately 50% or less of our total inbound tonnage. Thus, even if we would depreciate our investment in what I might refer to as our transfer terminal facility at Lawrenceburg over a 10 year basis which would amount to a cost of some $10,000 per year and add it to the other known

minimum yearly cost of $70,000 we would have at the very least an additional cost of $80,000 per year for our carbon black. The other products would likewise be higher but not to the same degree.

By way of contrast the evidence before the Interstate Commerce Commission in AB-2 Sub 5 (and I refer you by quick reference to Appendices C and D of the Initial Decision of Judge Murray) and in line with requirement 3 requiring information sufficient to support a finding by the Commission that the assistance being offered is likely to cover the difference between the revenues attributable to the line of railroad and the avoidable cost of providing rail service over the line plus a reasonable return, we would point out that the revenues attributable to the line for the years 1973, 1974 and 1975 were $34,494, $31,696, and $20,736 (1975 projected on basis of first 9 months) or a total revenue of $86,926. This would be an average revenue for the three years shown of $28,975.

Next by turning to Appendix C we can examine the avoidable cost on the branch. Under Maintenance of Way and Structures, this will be covered by federal funds secured through state and local help. Under Maintenance of Equipment for Locomotive Repairs (account 311) we would make a conservative estimate of $5,000 which we deem to be very high in view of the averages shown for the 3 years in question and the fact that the train would run now only run one day per week instead of three. Under Freight Train Car Repairs the figure would be zero because there would be no freight car repairs necessary. The cars moving over the line are owned by J. M. Huber Corporation and it must pay for repairs. Under Equipment-Depreciation we cannot ascertain how much of that is for locomotive versus cars but by comparing accounts

311 and 314 together with running the train on a one day per week we feel a very conservative estimate of $6,000 would more than cover all depreciation. Employee's Health and Welfare Benefits is negligible but you can put in $300 for Total Maintenance of Equipment to be $11,300.

Under Transportation, accounts 373 through 409, it appears that the three year average Total Transportation cost utilizing the methods discussed would be $68,509 per year based on three trains per week. Since we are only asking for one train per week service we would reduce that by two-thirds so that the re-computed transportation costs per year would be $22,836.

Under Income Accounts-Debit (532 and 536) we would estimate Payroll Taxes to be approximately $3,333. We would exclude Ad Valorem taxes based upon previous disclosures that the cities and counties would waive them. The Hire of Freight Cars we would estimate at $1,000 for Total Accounts-Debits to be $4,333. The Total Avoidable Expense on the branch would then be $38,469. According to the evidence of record the L & N Railroad is receiving an average rate of return of 4.8%. When you consider that the railroad is willing to abandon the line and in all likelihood it would cost it net monies to do to remove the tracks, ties, etc. it is most difficult to assess the value of the line. Nevertheless, for the sake of comparison we would arbitrarily assign what we feel to be a reasonable value of $100,000 which would give a reasonable return of $4,800 per year.

Thus, in summary by using the formula required in paragraph 3 (page 5, Procedures For Pending Rail Abandonment Cases served March 31, 1976) and the facts de-

veloped of record we have total avoidable costs of $38,469, income of $28,975 or a net loss per year of $9,494 plus $4,800 for a reasonable return for a yearly subsidy of $14,294.

Based upon the information available to American Biltrite, Inc., it hereby makes this offer to subsidize the service of the railroad. It further asks the railroad to temporarily cease any plans to stop service on the Centerville Branch until such time as it is able to complete these negotiations with you leading directly to negotiating a contract to that effect with you. It further asks that you please supply the undersigned with the appropriate data necessary as required by the Interstate Commerce Commission's Rules and Regulations to bring the record up to date and for determining a reasonable subsidy if different from above, for the continuation of services on the Centerville Branch. As soon as that information is made available we would like to meet with you to go over the matter fully to negotiate such a contract.

Very sincerely yours,

/s/ JAMES N. CLAY, III
James N. Clay, III

JNC: lf
cc: Hon. Robert L. Oswald
Rail Services Planning Office
Mr. Phil Griner
Mr. Gerald H. Weinstein
Mr. Eric F. Bowes
Mr. Edwin C. Wright
Mr. Frank C. Atherton

APPENDIX G

(Louisville & Nashville R. Co. Letterhead)

February 10, 1977

James N. Clay, III, Esq.
Pittman, Clay, Morgan, Cole, Gilliland & Saunders
2700 Sterick Building
Memphis, Tennessee 38103

Offer to Negotiate Subsidy Agreement For Operation of the Line of Railroad Situated in Dickinson, Hickman and Lewis Counties, Tennessee *[Docket No. AB-2 (Sub-No. 5)]*.

Dear Mr. Clay:

This responds to your letter of February 3, 1977 notifying the Louisville and Nashville Railroad Company that American Biltrite, Inc. will negotiate to provide assistance in the form of a subsidy payment to continue operation of the Centerville Branch for the benefit of its Lewis Products facility. L&N finds the suggested subsidy figure of approximately $14,000.00 to be unreasonably low. The figure could not be given serious consideration even if offered. Further, the subsidization "offer" does not satisfy the criteria of Section 1a(6) of the 4-R Act as set forth at 49 C.F.R. §1121.38(f)(1)(i) and (ii).

This response will deal with the following specific areas:

1. The type of subsidy that would be acceptable to L&N.

2. The uncertainty of state participation, specifically the absence of enabling legislation that would allow the State of Tennessee to participate in the local rail service assistance program.

3. The availability of possible financial relief for American Biltrite, Inc. through Tennessee's State Rail Planning funds to reduce the cost of lost rail service as outlined in Section 803(4) of the 4-R Act.

4. The legality of the proposed waiver of ad valorem taxes.

5. The indefinite or unstated position of the county and city governments and the other industry on the line.

6. L&N's threshold determination, under the Commission's Standards for Determining Rail Service Continuation Subsidies, of an adequate subsidy payment.

The Type of Subsidy Which Would Be Acceptable to L&N.

You have suggested at least two alternatives to a direct lump sum subsidy payment. L&N, at this time, has determined that a direct payment prior to each fiscal year or on a quarterly basis would be the only methods of payment acceptable in the operation of the Centerville Branch.

Rate adjustments would create problems in that the rates would have to be considered in light of regulations governing the application of a rate and its relationship to similar rates under like conditions of operation. By a

guarantee of a certain level of traffic I assume that you are indicating that you would pay a specified sum, to be adjusted at the end of the year, on a guaranteed number of carloads per year regardless of whether those carloads actually moved to the Lewis Products' facility. While it would be necessary to adjust the subsidy payment at the end of each fiscal year, it does not seem appropriate to base the subsidy payment directly on a guaranteed number of carloads. This, in effect, could be unfair to the shipper since costs do fluctuate based on the actual movements on the branch line.

With this position in mind, L&N therefore considers your $14,294.00 figure to be a suggested offer of advance lump sum payment or possibly a lump sum prorated on a quarterly settlement basis. Any prepaid subsidy would be subject to an upward or downward adjustment, on a fiscal year basis, to guarantee that the amount of financial assistance conformed to the actual cost of operating the branch.

The Availability of Possible Relief for American Biltrite, Inc. Through the Tennessee State Rail Planning Agency in the Reduction of Costs of Lost Rail Service as Outlined in Section 803(4) of the 4-R Act.

You have stated that to construct an alternate facility at Lawrenceburg, Tennessee to receive and transfer carbon black from rail cars to motor truck tank trailers would cost approximately $105,900.00 with an additional expense of at least $70,000.00 per year for the actual movement of the carbon black from Lawrenceburg to Hohenwald. The initial reaction to these figures is that they appear to be inflated and that some kind of documentary cost data should be supplied before the cost pre-

sentation is considered. Furthermore, other relief is available under the provisions of the 4-R Act, specifically Section 803(4). If rail service assistance funds are available to the State of Tennessee all or a part of the costs of the construction of alternate facilities could be offset through state funds and thereby result in a reduction of the cost of lost rail service to the Lewis Products facility.

The Legality of the Waiver of Ad Valorem Taxes.

You state specifically that there have been "previous disclosures that the cities and counties would waive [ad valorem taxes]." There has been no such disclosure to L&N and as a matter of fact there does not appear to be any provision in the state taxation laws that would allow a legal waiver of taxation. This specific statement in your offer is indicative of the many loose ends that remain that indicate that indeed there is not a foundation from which negotiations could proceed.

The Indefinite Position of the County and City Government and the Other Industry on the Line.

While one of the three counties on which the line is located has indicated to the Interstate Commerce Commission a vague intent to negotiate to purchase, there has been no indication that sufficient local government interest has been voiced to assure their essential participation in a subsidy agreement. American Biltrite has offered only to subsidize that portion of the operation that directly benefits Lewis Products and not the operation of the entire branch line. Since the Lewis Products' facility is located at the very end of the 50 mile branch, it would be necessary to operate the entire branch to serve that facility. If the entire branch line is operated, under a sub-

sidy agreement, L&N is required to provide common carrier service to the other industry on the branch line. The entire branch line operation must, therefore, be subsidized from some source.

The one county that has stated a vague interest in the negotiations has failed to make any attempt to prove that the county budget is such that there is a financial possibility of their carrying out such negotiations. It is assumed that some approval from the county governing board and possibly from the electorate would be necessary before such a major undertaking could be pursued.

L&N stresses that as early as May, 1976, attempts were made to enter into preliminary negotiations with American Biltrite as well as with the State and Fibreboard Corporation* to determine if a preliminary agreement could be reached. These offers were virtually ignored and this eleventh hour notification, after the pendency of an application for a period in excess of three years, is inappropriate and works to the detriment of reasonable negotiations. The Commission, in its Order of March 31, 1976, prompted parties involved in the pending abandonment proceeding to go forward and at least research the possibilities of continued rail service in the event that a determination was made that a certificate of public convenience and necessity allowing the abandonment should be issued.

L&N is reluctant to enter into negotiations with American Biltrite or other interested parties at this point until a more definite offer of subsidization is made. I think your clients will agree that their offer to negotiate is not sufficient standing alone to warrant pursuing this matter

*MMF Wood Products is a wholly owned subsidiary of Fibreboard Corporation.

further at this time. The offer to negotiate is not sufficiently certain to meet the standards the Commission has imposed.

It is not the responsibility of the Interstate Commerce Commission to deal with the kinds of problems your clients are facing. The I.C.C. cannot take any actions that can remedy the State's position under its own statutes and it cannot grant funds directly to the county governments to enable them to make a purchase offer. It is also manifest that the I.C.C. cannot prompt other shippers on the line to share in a subsidy payment.

The subsidy figure which you have suggested, but not offered, simply does not represent financial assistance which is likely to cover the difference between the revenues attributable to the line and the avoidable cost of providing rail freight service on the line plus a reasonable return on the value of the line.

L&N's Determination Under the Commission's Standards for Determining Rail Service Continuation Subsidies of a Reasonable Subsidy Amount.

The Comission's March 31, 1976 Order requires L&N to respond to your offer to negotiate by giving you specific information on the present physical condition of the line, current train operations and traffic and the information required at 49 C.F.R. §1125. The §1125 information is included in the attached calculation of a threshold subsidy determination.

L&N's engineering department reports, as of February 9, 1977, that the condition of the line

". . . continues to be . . . extremely poor . . . and deterioration is accelerating rapidly. Within the the past year over 600 ties and 8,000 board feet of switch ties have been installed, approximately 250' of rail changed out, and brush cutter operated over the entire branch in order to keep it operable; however, this was not sufficient to keep pace with the rapid deterioration.

In order to maintain minimum track standards it will be necessary that approximately 26,000 ties be installed and that approximately 20,000 feet of rail be relaid in the very near future . . . ."

Train service is presently provided at least once-a-week, *i.e.*, the train goes up and back during each seven days, unless there is a request for, and need for, additional trips.

Rehabilitation costs to bring the line to a static Class I standard remains in the $600,000 range estimated in January, 1976. However, rapid deterioration, as outlined above, is a critical factor.

Setting aside the two fundamental calculations on rehabilitation and casualty reserve, L&N considers $78,694* as the base figure from which negotiations would proceed. The figure shown for once-a-week service, *i.e.*, $54,314 was calculated only to emphasize the margin between your estimated subsidy and the actual base figure on the once-a-week service. There has been no indication that all other shippers on the branch would accept service on a once-a-week basis.

Please note that L&N *would require* a subsidy *above* the base figure after an agreement had been reached on

*See attachment.

the rehabilitation and casualty reserve contributions that are necessary.

In short, L&N, while recognizing the financial responsibility of American Biltrite, cannot accept the offer which has been made as a serious offer to subsidize the line. You have had the basic information available to you for at least a full year and only at this point has an effort been made to an attempt to *open* consideration of the possibility of a subsidy agreement. At least a draft of the proposed agreement should have been presented. It is also noted that there is no corporate resolution, authorization or other evidence that American Biltrite's Board of Directors will authorize the execution and fulfillment of an agreement even if a final agreement could be reached.

In light of the factual situation outlined herein, L&N is requesting that the Commission find that an offer of financial assistance which is likely to satisfy the criteria of Section 1a (6) of the Interstate Commerce Act has not been made.

As required by 49 C.F.R. §1121.38(e), L&N makes available at its offices at 908 West Broadway, Louisville, Kentucky, the records, accounts, appraisals, working papers, and other documents used in the preparation of the attached calculation of a proposed, but not final, estimated subsidy payment.

Yours very truly,

/s/ Wandaleen Poynter
Wandaleen Poynter

WP/pw

Copies to -

All Parties of Record.

Hon. Robert L. Oswald, Secretary
Interstate Commerce Commission
Washington, D. C. 20423

REVENUES ATTRIBUTABLE FOR	OCT., 1975 THRU SEPT., 1976 BASE YEAR OPERATIONS	PROJECTED SUBSIDY YEAR OPERATIONS (Based on Once-a-Week Service)
1. Freight Originated and/or Terminated on Branch	$175,333	$175,333
2. Bridge Traffic	-o-	-o-
3. Demurrage	-o-	-o-
4. All Other	-o-	-o-
5. Total Revenues Attributable (lines 1 through 4)	$175,333	$175,333
AVOIDABLE COSTS FOR		
6. Off-Branch Costs	$ 84,866	$ 84,866
7. On-Branch Costs (lines 7a through 7k)		
a. Maintenance of Way and Structures*	19,049	19,049
b. Maintenance of Equipment	18,631	20,574
c. Traffic	-o-	-o-
d. Transportation	70,212	46,973
e. Miscellaneous General	-o-	-o-
f. Miscellaneous Operations	-o-	-o-
g. Fringe Benefits	13,044	10,545
h. Taxes	23,573	23,573
i. Rent Income	-o-	-o-
j. Rent Costs	-o-	-o-
k. Bridge Traffic Rerouting	-o-	-o-
8. Total Avoidable Costs	$229,375	$205,580

*Annualized Jan., 1975 through September, 1975 shown on I.C.C. Record in I.C.C. Docket AB-2 (Sub 5).

SUBSIDIZATION COSTS FOR

9. Rehabilitation[1]		
10. Administrative Costs (Subsidy Year only)[2]		
11. Casualty Reserve Account[2]		
12. Total Subsidization Costs		

RETURN ON VALUE FOR

13. Valuation of Property (lines 13a through 13c)		
a. Working Capital	5,772	4,794
b. Income Tax Benefits	12,970	7,259
*c. Net Liquidation Value	263,000	263,000
14. Rate of Return 8.75% (Latest C.S.A.)		
15. Total Return on Value (line 13 times line 14)	24,652	24,067
16. Avoidable Loss from Operations (line 5 minus line 8)	54,042	30,247
17. Estimated Subsidy (line 5 minus lines 8, 12 and 15)	78,694	54,314

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[1]Projection shall include amounts necessary to attain FRA Class I safety standard.

[2]Omit in applications pursuant to Section 1121.32 and 1121.33.

*Net Liquidation Value for highest and best use for non-rail purposes—figure represents preliminary appraisal submitted by Tennessee Department of Conservation for purpose of negotiation on purchase for hiking/biking facility.

APPENDIX H

SHORT TERM RAIL SERVICE CONTINUATION AGREEMENT FOR LOUISVILLE AND NASHVILLE RAILROAD COMPANY'S CENTERVILLE BRANCH

This Agreement made and entered into this 6th day of September, 1977, by and between Louisville and Nashville Railroad Company ("L&N"), a Kentucky corporation with principal offices at 908 West Broadway, Louisville, Kentucky 40201, and the Tennessee Department of Transportation ("DOT"), 817 Department of Transportation Building, Nashville, Tennessee 37219,

WHEREAS, DOT has offered to reimburse L&N the cost of continuation of rail freight service on its Centerville Branch ("the Branch") between Colesburg and Hohenwald in Dickson, Hickman and Lewis Counties, Tennessee, in order temporarily to delay L&N's exercise of Interstate Commerce Commission granted authority to abandon the Branch for the sole purpose of providing the South Central Tennessee Railroad Authority adequate opportunity to coordinate arrangements to purchase said Branch; and

WHEREAS, L&N is willing to continue providing common carrier rail service for a limited period of time on the Branch on the basis of the consideration, and under the terms and conditions set forth herein;

NOW, THEREFORE, the undersigned parties do hereby mutually covenant and agree that L&N shall provide common carrier rail freight service on the Branch and

shall be compensated by the DOT therefor as follows:

ARTICLE I. OPERATING PLAN

Section A. **Provision of Service.** L&N agrees to provide during the term of this contract once a week rail freight service, as needed, on the Centerville Branch. L&N will increase service on the Centerville Branch if, in L&N's opinion, traffic levels require increased service and if, in L&N's opinion, operating conditions permit increased service.

Section B. **Force Majeure: Excuse.** The parties hereto shall be excused from performance of any of their respective obligations hereunder where such performance is prevented by any event beyond their respective control, which shall include, without limitation, any actions of any federal, state or local agency or instrumentality; acts of God; strikes or other labor troubles, explosions, fires, or vandalism.

Section C. Neither party may assign any of its rights or obligations arising from this Agreement.

ARTICLE II. MANAGEMENT AND CONTROL

Section A. **Control of Management and of Operations.** L&N shall have exclusive control over the management and operation of the Branch, including the dispatching of trains, car service, assignment of crews, and assignment and utilization of motive power.

Section B. **Operating Rules and Regulations.** L&N shall have exclusive authority to promulgate and adopt rules and regulations for the operation of trains over the

Branch.

Section C. **Crew Size.** L&N shall determine the size of train crews necessary for the Centerville Branch operation and such crew sizes shall not be inconsistent with nor more than the crew sizes required by applicable collective bargaining agreements and state law.

ARTICLE III. REHABILITATION AND MAINTENANCE

Section A. It is understood and agreed that the condition of the Branch will require immediate rehabilitation, at the sole cost of the DOT. DOT agrees and covenants that it shall pay to L&N the full cost of the rehabilitation work as shown on line 11 of Appendix A as required by the terms of the final agreement reached with the independent contractor who actually performs the rehabilitation work. It is understood that the rehabilitation will be done by an independent contractor selected and supervised by L&N.

If L&N does not receive payment or payments for the rehabilitation work, as required by Agreement with the independent contractor, it shall have the right, at its option, of terminating this Agreement. The Contract Agreement with the independent contractor is incorporated by reference and made a part hereof. This section becomes effective upon execution.

Section B. L&N will provide for and accomplish all maintenance-of-way and structures on the Centerville Branch which in its judgment are necessary to permit operation of rail freight service in compliance with Federal Railroad Administration safety standards or pursuant to any safety waiver issued in relation to the Branch. Main-

tenance will be considered to apply subsequent to any initial rehabilitation required to permit continuation of operations. The cost of the aforementioned maintenance-of-way and structures shall be included in the avoidable costs used to compute the reimbursement payment for this line.

Section C. **Embargo Due to Unsafe Conditions.** It is understood by both parties to this Agreement that if conditions arise which, in the judgment of L&N qualified track inspectors make operations over the Branch unsafe, the Branch shall be embargoed pursuant to accepted railroad practices as monitored by the Interstate Commerce Commission until such conditions can be corrected. L&N will not incur liability for any failure to perform the rail freight service if such failure is the result of any unsafe condition of any of the rail facilities.

ARTICLE IV. SERVICE REIMBURSEMENT PAYMENTS

Section A. **Compensation.** As consideration for L&N's deferral of the exercise of its authority to abandon rail freight service over the Branch, DOT shall pay L&N, on the schedule hereinafter described, the "estimated reimbursement" figure as computed and designated on Appendix A. After the expiration of this contract, the reimbursement figure will be recomputed based upon actual operations on the Centerville Branch during the term of this contract, and a report showing the recomputation will be furnished to DOT. If the recomputed reimbursement figure exceeds the estimated reimbursement figure, DOT shall pay the difference to L&N within thirty (30) days of DOT's receipt of L&N's recomputed report. If the estimated reimbursement figure exceeds the recomputed reimbursement figure, L&N shall pay the difference

to DOT within thirty (30) days of the date on which its recomputed report is mailed to DOT.

Section B. **Reimbursement Payment Schedule.** DOT shall pay L&N the indicated portions of the estimated amount in six equal payments with the first payment due ten days after the service date of the Certificate of Public Convenience and Necessity authorizing abandonment, with each remaining payment due on the corresponding date of the five remaining months.

If L&N does not receive a required payment on the scheduled date, it shall have the right, at its option, of terminating this Agreement and exercising its authority to abandon the Branch.

ARTICLE V. LIABILITY AND INSURANCE

L&N covenants and agrees to accept the risks of operations on the Centerville Branch. In consideration of L&N's assumption of said risks, DOT covenants and agrees to pay the entire premiums of any insurance policies which L&N, in its sole discretion, may deem necessary to cover such risks of operation; to reimburse L&N for any actions, claims, demands, liabilities, losses, damages or expenses within the deductible amount of L&N's insurance policies, which L&N may sustain or incur by reason or in consequence of its operation of the Centerville Branch during the term of its contract; and to indemnify L&N for any increased premium cost it incurs as a result of claims against its master insurance policies for accidents on the Centerville Branch.

ARTICLE VI. ADMINISTRATIVE AND MANAGEMENT FEES

DOT hereby covenants and agrees to pay L&N an administrative fee of 5 per cent of total revenues attributable to the Branch.

ARTICLE VII. FREIGHT RATES AND ADJUSTMENTS

Section A. **Freight Rates.** L&N will continue to charge for common carrier services rendered pursuant to its Centerville Branch operation on the basis of the rates, charges, rules and regulations published in its applicable tariffs.

Section B. **Freight Rate Adjustments.** L&N may from time to time during the term of this contract seek changes in tariffs, rates and divisions. Any proposed changes will be submitted to the appropriate regulatory authorities.

ARTICLE VIII. ACCOUNTING REPORTS.

Section A. **Audit and Inspection.** Upon reasonable notice, L&N will permit DOT's authorized auditors to audit all L&N records pertaining to the Centerville Branch at its corporate offices at 908 W. Broadway during regular business hours, which are used in computing the actual DOT payment for the Centerville Branch operation. L&N will also permit one inspection per month of operation of the Centerville Branch facilities. L&N retains the right to limit to a reasonable number the persons participating in any one inspection. DOT agrees that its agents shall execute an instrument releasing L&N from liability for any injury or death that may result from any cause during such inspections.

ARTICLE IX. ARBITRATION

In the event of any dispute concerning the construction

of this Agreement or the performance of either party hereunder which cannot be settled between the parties, either party may submit such dispute to arbitration. The party desiring arbitration shall give notice to that effect to the other party identifying with specificity the matter or matters in issue and shall propose an individual to serve as Arbitrator. The respondent party shall have the option of accepting the individual petitioner recommends for arbitrator, in which event said individual shall serve as sole arbitrator, or of selecting a second arbitrator who shall, within thirty (30) days of the respondent party's receipt of the notice of submission of the dispute to arbitration, meet with the first named arbitrator to select a third arbitrator. If the respondent party does not name a second arbitrator by the fifteenth day after its receipt of the notice of arbitration, the first named arbitration shall serve as the sole arbitrator. If the two arbitrators appointed by the parties are unable to agree upon the appointment of a third arbitrator, either party may request the appointment of a third arbitrator by the President of the American Arbitrators Association. No later than fifteen (15) days after the arbitration panel is fully constituted, it shall notify the parties of the arbitration procedure to be followed. The arbitration panel shall render its decision no later than sixty (60) days after the parties are notified of the arbitration procedure to be followed.

Section B. The determination of the majority of the arbitrators or of the sole arbitrator, as the case may be, shall be final and conclusive between and upon the parties and judgment upon same may be entered at any Court having jurisdiction thereof.

Section C. The arbitration panel shall give written notice to the parties stating its determination and shall

furnish to both parties a copy of said determination signed by each member of the arbitration panel. The expenses of arbitration, except for payment of each payment of each respective party's counsel fees and fees of experts, shall be equally borne by the parties.

Section D. Arbitration shall not extend the agreement beyond the termination date specified.

ARTICLE X. CONTRACT TERM AND RENEWAL

Section A. Term. This Agreement, unless otherwise specified, shall be in effect during the six-month period immediately following the service date of the Certificate of Public Convenience and Necessity by the Interstate Commerce Commission, but its expiration date may be extended by mutual assent of both parties on a month-to-month basis not to extend beyond July 1, 1978. Such assent will not be withheld if reasonable progress is being made toward finalizing an arrangement whereby some financially responsibile entity will purchase L&N's interest in the Centerville Branch. If the term of this Agreement is extended, the payment system set forth in Article IV will be utilized with appropriate adjustments to conform with the term.

Section B. **DOT's Termination.** DOT *and/or L&N* terminate this Agreement on thirty (30) days' notice.

Section C. **Expenses of Termination.** Expenses of termination shall be a cost of providing service. L&N shall mitigate the cost of termination to the extent possible.

ARTICLE XI. REPRESENTATIONS AND WARRANTIES

Section A. L&N represents and warrants the following:

1. L&N is a corporation duly organized, validly existing and in good standing under the laws of the State of Kentucky and is duly qualified to do business in the State of Tennessee.

2. L&N has full power and authority to enter into this Agreement and to carry out the functions which it has undertaken in this Agreement.

3. All corporate and other proceedings required to be taken by or on the part of L&N to authorize it to enter into this Agreement and to perform the rail freight service contemplated therein have been duly taken; and

4. Execution of this Agreement and operation of the rail freight service contemplated therein will not violate any statute, rule, regulation, order, writ, injunction or decree of any Court, administrative agency or governmental body.

Section B. The DOT represents and warrants the following:

1. DOT has the power and authority to enter into this Agreement and carry out its obligations under the Agreement;

2. DOT's entry into and performance of this Agreement will not violate any statute, rule, regulation, order,

writ, injunction or decree of any Court, administrative agency or governmental body; and

3. Funds for payment of the reimbursement figures required by this Agreement have been authorized and appropriated to DOT.

ARTICLE XII. GENERAL PROVISIONS

Section A. This Agreement and the attachments annexed hereto and integrated herewith represent the whole and total understanding between the parties and supersede any and all prior agreements or oral understandings between the parties. Any change, modification, addition or deletion to or from this Agreement may be made from time to time as the parties may agree, but must be evidenced in written form to be attached hereto and made a part hereof.

Section B. **Choice of Law.** This Agreement shall in all respects be governed by the laws of the State of Kentucky.

Section C. **Notices.** Any written notices required under this Agreement shall be sent by registered mail, return receipt requested, to the parties to be notified at the addresses set forth at the beginning hereof, unless such parties shall inform the other party in writing of any changes in its address.

Section D. **Severability.** Each and every clause of this Agreement shall be severable from each other. If any term, covenant, condition or provision "or part thereof" of this Agreement shall, at any time or to any extent, be invalid or unenforceable for any reason, the remainder shall not be affected thereby, and each term, covenant,

condition and provision of this Agreement shall be valid and be enforceable to the fullest extent permitted by law.

The waiver of a breach of any of the terms or conditions hereof shall be limited to the act or acts constituting such breach and shall not be construed as being a continuing or permanent waiver of such terms and conditions, all of which shall be and remain in full force and effect as to future acts or happenings notwithstanding such waiver.

IN WITNESS WHEREOF, and intending to be legally bound hereby, the parties hereto have caused this Agreement to be executed and attested by their duly authorized officers on the date and year first written above.

LOUISVILLE AND NASHVILLE
RAILROAD COMPANY

By: /s/ Prime F. Osborn
Prime F. Osborn, President

(CORPORATE SEAL)

COMMISSIONER OF
TRANSPORTATION
STATE OF TENNESSEE

By: /s/ Eddie Shaw

(STATE SEAL)

STATE OF FLORIDA)
COUNTY OF DUVAL)

On this 9th day of August, 1977, before me personally appeared, Prime F. Osborn, known to me to be the President of Louisville and Nashville Railroad Company, and in my presence subscribed the attached document.

Subscribed before me this 9th day of August, 1977.

/s/ C. Beecher Smith
Notary Public

My Commission expires: Jan. 4, 1978.

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

On this 6th day of September, 1977, before me personally appeared Eddie Shaw, known to me to be the Commissioner of Transportation, State of Tennessee, and in my presence subscribed the attached document.

Subscribed before me this 6th day of September, 1977.

/s/ Harvey N. Templeton
Notary Public

My Commission expires: March 12, 1978

APPENDIX A

	1976 BASE YEAR WEEKLY OPERATION	ESTIMATED 6-MONTHS WEEKLY OPERATION
1. Traffic Density	388	194
2. Revenues Attributable	$144,506	$ 72,253
AVOIDABLE COST		
3. Off-Branch	76,313	38,156
4. On-Branch:		
A. Maintenance of Way Structures	20,479	10,239
B. Maintenance of Equipment	18,994	9,497
C. Transportation	46,117	23,059
D. Fringe Benefits	9,884	4,942
E. Taxes	29,042	36,303
5. Total Avoidable Cost	$200,829	$122,196
RETURN ON VALUE		
6. Investment Base:		
F.		Working Capital
G.		Income Tax Benefit
H.		Liquidation
I.		Rate of Return
7. Total Return on Value	$ 25,767	$ 13,616
ADMINISTRATIVE COST		
8. Total Administrative Cost	$ 7,225	$ 3,613
9. Estimated Service Reimbursement Excluding Rehabilitation (Line 2 minus Lines 5, 7 & 8)	$ 89,315	$ 67,172
10. Estimated Monthly Payments Excluding Rehabilitation	$ 7,443	$ 11,195

11. Rehabilitation Cost Payable in Accordance with Article III, Section A of the Agreement	$ ~~70,000~~ $103,223.80

Cost Accounting
August 8, 1977

Supreme Court, U. S.
FILED
MAR 10 1978
MICHAEL RODAK, JR., CLERK

No. 77-1085

In the Supreme Court of the United States

OCTOBER TERM, 1977

AMERICAN BILTRITE, INC., ET AL., PETITIONERS

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

MARK L. EVANS,
General Counsel,

HENRI F. RUSH,
Associate General Counsel,

ALAN J. THIEMANN,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

In October 1973 the Louisville and Nashville Railroad Co. filed an application with the Interstate Commerce Commission for a certificate of public convenience and necessity that would permit abandonment of approximately 50.5 miles of rail line in Tennessee. The application was opposed by petitioners and other parties (see Pet. App. 15).[1] After a hearing the Commission,

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[1]We are uncertain whether the petition for a writ of certiorari, which identifies seven parties as petitioners, is filed on behalf of each of those parties or only on behalf of American Biltrite, Inc. (see Pet. 1). To the extent that the other parties are petitioners, their petition is untimely. The judgment of the court of appeals was entered on June 27, 1977, and a petition for rehearing was denied on July 25, 1977 (Pet. App. 11). On October 12, 1977, Mr. Justice Stewart extended American Biltrite's time for filing a petition for a writ of certiorari to and including December 22, 1977. No other party was granted an extension of time, and the time within which to file a petition therefore expired on October 23, 1977. See 28 U.S.C. 2101(c).

adopting the findings and conclusions of an administrative law judge, found that the proposed abandonment was consistent with the public convenience and necessity; it ordered that, subject to certain conditions, an appropriate certificate of abandonment should be issued (Pet. App. 13, 32-34).

The court of appeals affirmed (Pet. App. 9-10). It concluded that the "Commission's decision to grant the abandonment application is rational and supported by substantial evidence" (Pet. App. 10). In October 1977, after the court of appeals denied a petition for rehearing (Pet. App. 11), the Commission issued a certificate of abandonment to the Louisville and Nashville Railroad.

The decision of the court of appeals is correct, and further review is not warranted.

Petitioners argue that the Commission "apparently" (Pet. 7) failed to impose on the applicant the burden of proving that abandonment was consistent with the public convenience and necessity. Nothing in the Commission's order supports petitioners' contention that the burden of proof was allocated improperly. Although the Commission quite naturally "weigh[ed] the arguments advanced pro and con" (Pet. App. 28), it correctly stated that "no abandonment shall occur unless and until the Commission [determines] * * * that the present or future public convenience and necessity permit [it]" (*ibid.*). See *Colorado* v. *United States*, 271 U.S. 153, 168. The Commission's analysis of the parties' competing contentions reflects a recognition that the burden of proof was

on the applicant (Pet. App. 28-32); the Commission simply found that the applicant had made a convincing case.[2]

Petitioners also challenge the reliability of the railroad's financial data, which the Commission considered in finding that the line was not profitable (Pet. 7-8). The court of appeals correctly concluded, however, that the Commission's findings are "supported by substantial evidence" (Pet. App. 10), and petitioners have not shown that the court "misapprehended or grossly misapplied" that standard of review. *Mobil Oil Corp.* v. *Federal Power Commission*, 417 U.S. 283, 330; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.[3] The Commission thoroughly discussed the financial data (Pet. App. 16-18, 28-30), and the courts may not reweigh the evidence. *Ralston Purina Co.* v. *Louisville & Nashville R. R.*, 426 U.S. 476.

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[2] Section 802 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. 94-210, 90 Stat. 31, 127, adding 49 U.S.C. (1976 ed.) 1a(1) *et seq.*, does not affect the allocation of burdens. Ex parte No. 274 (Sub-No. 2), *Abandonment of Railroad Lines and Discontinuance of Service* (Report of the Commission on Reconsideration, May 3, 1977, p. 21). The burden always has been on the applicant for abandonment, and the new statute simply codifies the Commission's practice. The statute's significance lies in the new provision allowing any responsible person or governmental entity to purchase or financially support the line, thus preserving it. See 49 U.S.C. (1976 ed.) 1a(6)(a), (7); H.R. Conf. Rep. No. 94-768, 94th Cong., 1st Sess. 180-181 (1975). The Commission discussed these new provisions and allowed eligible parties to take advantage of them (Pet. App. 13, 30-34).

[3] Petitioners' suggestion that the Commission relied solely on "the failure of profitable operation" (Pet. 8) in determining that abandonment was justified is groundless. The Commission also considered the physical condition of the line, the possibility of reducing losses by altering service, the present and future needs of shippers, and the effect of abandonment on industrial development and on labor (Pet. App. 28-32).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARK L. EVANS,
General Counsel,

HENRI F. RUSH,
Associate General Counsel,

ALAN J. THIEMANN,
Attorney,
Interstate Commerce Commission.

MARCH 1978.

DOJ-1978-03